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Judges of the High Court

1917

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PRIVY COUNCIL.

PRESENT:—VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW, LORD PARMOOR AND MR. AMEER ALI.

K. P. L. S. Palaniappa Chetty and another ... *Appellant* *

v.

Sreemath Deivasikamony Pandara Sannadhi ... *Respondent.*

P. C.

Palaniappa Chetty *v.* Deivasikamony Pandara Sannadhi.

Hindu Law—Endowments—Powers of shebait—Permanent lease of debutter property by shebait—Necessity or benefit, test of—Rules according to which the property and income of the endowment are to be dealt with—Sale of debutter property with a view to investing the sale proceeds—Propriety of—Existence of an ancient custom—A question of mixed law and fact.

Where a shebait of a Hindu temple leased out on permanent cowle, a house site belonging to the temple on which there were some ruins and which was not fetching any income, on a premium of Rs. 93-12-0 to the trustees of another charity and the succeeding shebait sued for a declaration that the permanent lease was invalid and for recovery of possession of the site after demolishing the buildings which the lessees had erected on the site.

Held, the grant of a lease in perpetuity of debutter lands at a fixed rent requires to be justified by unavoidable necessity; and an absolute alienation of the property in perpetuity in consideration of a premium also requires to be justified by the same kind of necessity.

The power of the manager of an infant heir to whose position that of a shebait is analogous, to charge an estate not his own is under the Hindu Law a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. It is impossible to give a precise definition of the expression "benefit to the estate" so as to be applicable to all cases. The preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by these and such like things would be obviously benefits.

A shebait would not be justified in selling debutter land solely for the purpose of getting capital to embark on a money lending business, however attractive and lucrative money lending may be.

Where there is no deed of endowment, the rules according to which the property and its income are to be dealt with in order to carry out the intention of the original endower can only be ascertained by inference from the practice proved by evidence, to have been followed in the particular case. But these rules, so to be

* 1st and 2nd February, 1917.

See (1910) 20 M. L. J. 969 : I. L. R. 34 M. 585.

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inferred must not be inconsistent with or repugnant to the very nature and purpose of the endowment. If, for instance, the worship of the idol in the temple be intended to be perpetual, the preservation and use of the dedicated property to support and maintain that worship, must be assumed to have been intended to be perpetual. A rule, therefore which would authorise and empower the shebait of such a temple, arbitrarily and at his own mere will and pleasure to alienate the dedicated property either bit by bit or *en bloc* would be so repugnant to the whole purpose and object of the endowment that it could not rationally be held to embody the intention of the original endower.

The existence of an ancient custom is a question of mixed law and fact. To find an ancient custom, the judge has first to find what were the things actually done in alleged pursuance of custom and then has to determine whether these facts so found satisfy the requirements of the law. This latter is a question of law and not of fact.

Appeal against a decree of the Madras High Court, reversing a decree of the Additional Subordinate Judge of Madura and restoring a decree of the District Munsif of Sivaganga.

The facts of the case sufficiently appear from their Lordships' judgment. The suit was brought by the respondent as Shebait of the Subramaniaswamy Devastanam, to set aside the alienation in perpetuity of certain land made in consideration of a premium by his predecessor. The District Munsif of Sivaganga held that such alienation was absolutely beyond the competency of the Shebait and decreed the suit. On appeal the Additional Subordinate Judge reversed this decision, holding that by local custom or usage the head of the temple could grant permanent leases for housebuilding and that the particular lease impeached was an act of prudent management. Respondent preferred a second appeal and the High Court (Wallis and Krishnaswami Aiyar, JJ.) restored the original decree.

Hence this appeal.

De Gruyther K. C., with him *Dube*, for Appellants :—The whole question here is whether the lease impeached was prudent. To decide this it is necessary to consider the circumstances how and why was the lease made. We have findings that it was in fact prudent, but respondents impeach it as being beyond the Shebait's power whether prudent or not.

[*Sir Erle Richards*: I don't admit it was prudent but my contention is that it was *ultra vires*].

[*Lord Parmoor*: In this country you have consecrated land, which is not being used, but which you cannot alienate.]

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As to the powers of the manager of a Mutt, see *Prosunno Kumari Debya* v. *Golab Chand Baboo* [1], *Konwur Doorganath Roy* v. *Ram Chunder Sen* [2]. In the first case it was laid down by this Board that although a grant in perpetuity by a Shebait would be *prima facie* a breach of trust, it might be warranted :

(1) by the terms of the original endowment, (2) by usage or (3) was in some way beneficial to the interest of the trust. All three of these grounds are found here.

The High Court has held that the evidence of usage is not sufficient to support a custom. Their main ground is that the earliest instance of permanent lease is in 1870 ; but this is incorrect, as there is filed a lease of 1856 reciting the custom. Apart from this they had no jurisdiction to set aside the Subordinate Judge's finding that the custom exists : it is a finding of fact and binds them.

In some of the cases it is said such a lease can only be supported by "necessity". Necessity is a relative term : I submit it is sufficient that the alienation is for the benefit of the estate. In *Murugesam Pillai* v. *Manikkavasaka* [3], it was held that the Shebait can charge Mutt property for litigation affecting the Mutt.

[*Viscount Haldane* :—A trustee is entitled to his costs, charges and expenses, and when he has incurred them he can get them out of the estate.]

The Pandara is not a trustee but a manager. The real analogy is that of the guardian of a minor. The term "Necessity" is taken from *Hunooman Persaud Panday* v. *Munraj Koonweree* [4], where Lord Justice Knight Bruce (at pp. 423 &c.) discusses at length the powers of the manager for an infant heir.

In recent cases this Board has invariably laid down that the true test of a Shebait's powers is whether the acts would be upheld if he were the guardian of an infant.

[Counsel then went into the facts to show that the lease was an act of good management.]

[*Sir Erle Richards* : This question of necessity is a question of fact. It was not raised in the pleadings or in the Courts below and is not now open.]

Of the cases on which the High Court relied as establishing that the manager of a temple cannot grant a permanent lease

1. (1875) L. R. 2 I. A. 145.
2. (1876) L. R. 4 I. A. 52.
3. (1917) I.L.R. 40 M. 402 : 32 M.L.J. 369.
4. (1856) 6 M. I. A. p. 393.

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S. P. R. S. Mayandi Chettiar v. *Chokkalingam Pillai* [1], besides that it was *ex parte*, is not really in point. The question decided was whether the parakudis had a permanent tenure and it was held that they had not. The operative part of the judgment begins at p. 92 : the remarks at p. 88 are *obiter dicta*.

In *Abhiram Goswami* v. *Shyama Charan Nandi* [2], the village leased was the whole endowment, and the disposition was held invalid on that ground.

Reference was also made to *Shibeshwari Debi* v. *Mathuranath Acharji* [3]: *Vidyapura Tirtha Swami* v. *Vidyanidhi Tirtha Swami* [4].

B. Dube, followed :—Under the usage of the Mutt the Mohant had power to make these leases. The Subordinate Judge's finding is final : S. 584 of the Civil Procedure Code (Act XIV of 1882). An issue was specially fixed :—" Is it customary in the Anjukoil Devastanam to grant perpetual cowles." The Munsif finds " that from a very long time permanent leases of temple land are being granted and that the lessees are in undisturbed possession thereof."

[*Viscount Haldane*: He just stops short of finding a custom.]

From the evidence I ask the Board to infer that the rules of the mutt authorised the Mohant to do this.

[*Viscount Haldane*: The Munsif finds a practice not amounting to a legal custom.]

[*Lord Atkinson*: He finds a practice. He says it is contended that it is a custom, but that if it were a custom it would be bad custom.]

The case is an appeal to the equitable jurisdiction of the Court. The Court can grant relief if it thinks fit. Here we have incurred expense in putting up a building.

Both Courts have found that the Mohant's action was reasonable and prudent. The Mohant's powers are very wide. *Sammantha Pandara* v. *Selappa Chetti* [5].

We were purchasing in good faith, and are protected by S. 51 of the Transfer of Property Act. The power of alienation now impeached has in fact been exercised in great many cases, and much hardship will result from its being held invalid.

1. (1904) L. R. 31 I. A. 83=41 M. L. J. 200.
2. (1909) L. R. 36 I. A. 148=19 M. L. J. 530.
3. (1869) 13 M. I. A. 270, 275. 4. (1904) I.L R. 27 M. 435=14 M.L.J. 105
5. (1879) I.L.R, 2 M. 175, at p. 179.

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Lord Atkinson.

It has been frequently laid down that no hard and fast doctrine can be applied to Mutts, and that the usage of the particular mutt stands as the law therefor :—*Ram Perkash Das* v. *Anand Bas* [1].

Sir Erle Richards K. C., & Kenworthy Brown for the respondent were not called on.

Their Lordships' judgment was delivered (March 22nd, 1917) by

Lord Atkinson.—This is an appeal against a decree of the High Court of Judicature at Madras, dated the 18th October, 1910, which reversed a decree dated the 10th August, 1908, of the Additional Subordinate Judge of Madura, and restored that dated the 30th June, 1906, of the District Munsif of Sivaganga, pronounced in the original suit No. 10 of 1905.

In the village of Kunnakudy, in the district of Madura, there are several Hindu temples ; one of these, styled the Subramaniaswamy Devastanam, has been endowed, for the religious service of the idol, with certain lands in and about this village, including a building site situate in one of the streets of the village, upon which site, in and previous to the year 1897, some ruins stood. The Shebait of this temple is represented by the respondent. Should the property, the subject of such an endowment as this, have been formally dedicated to the Deity or the idol for worship in the temple by a deed of endowment it would presumably contain directions as to the mode in which the property is to be used, and its income applied for the particular religious or charitable purposes mentioned in the instrument. But where, as in the present case, no deed of this kind is forthcoming, the rules according to which the property and its income are to be dealt with in order to carry out the intention of the original endower can only be ascertained by inference from the practice proved by evidence to have been followed in the particular case (*Ram Parkash Das* v. *Anand Das* [1]). But these rules, so to be inferred, must not in their Lordships' view be inconsistent with or repugnant to the very nature and purpose of the endowment. If, for instance, the worship of the idol in the temple be intended to be perpetual, as it could hardly fail to be, then the preservation and use of the dedicated property to support and maintain that worship must, they think, be assumed to have been similarly intended to be perpetual. A rule, therefore, which would authorise and empower

1. (1916) L.R. 43 I. A. 73, 76=31 M. L. J. 1.

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the Shebait of such a temple, arbitrarily, at his own mere will and pleasure to alienate the dedicated property, either bit by bit or *en bloc*, would be so repugnant to the whole purpose and object of the endowment that it could not, in their view, be rationally held to embody the intention of the original endower.

In the year 1897 no rent was received out of this site; the ruins upon it had become a nuisance. Proceedings before the magistrate to abate the nuisance were either pending or about to be taken. It would, according to the report of one of the Shebait officers, have cost more than 200 rupees to have had the site walled round so as to prevent access to it by the public. In that state of things K.P.L.S. Palaniappa Chetty, one of the appellants, on the 6th April, 1897, applied to the then Shebait for the grant of a perpetual *Cowle* of this site at the rent of rupees 1-8-0 per annum for the purpose of erecting thereon buildings for an Annathanam Mutt. Other offers were apparently made for the acquisition of the site. They were, no doubt, considered by the existing Shebait, and his advisers; but on the 14th April, 1897, a perpetual *Cowle* was, in consideration of the sum of rupees 93-12-0 paid as a premium, granted to the two appellants for the purpose of erecting buildings thereon "for the said Annathanam Matam Charity." The charity contemplated was the erection of a kind of rest house for pilgrims passing through the village, irrespective of the consideration from whence they came or where they were proceeding to, and equally irrespective of whether or not they worshipped in the temple, or desired so to do, or contributed in any way to its maintenance. It was, therefore, a charity not in any sense subsidiary to or connected with the temple or the religious services performed therein, but was an entirely separate and independent charity, of a wholly different kind and character, to the support or maintenance of which none of the dedicated property or its produce could as an act of charity be legitimately applied.

The suit out of which this appeal has arisen was instituted by the respondent, the present Shebait, against the appellants impeaching the *Cowle* so granted to them by his predecessor, and praying that, amongst other things, it might be declared to be invalid as being, in effect if not in form, an alienation of the absolute interest in a portion of the immovable property dedicated to the services of the temple, for the purposes of an alien charity;

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and further praying that the appellants might be directed to demolish all the building erected by them upon this site, to remove all materials from it, to restore it to its original condition, and to deliver up possession of it when so restored to the respondent. In the Courts in India the appellants made the case that they had acquired this site in the year 1880 from one Samier, and that it was not the property of this Mutt at all. That case was found by these tribunals to be false. Having regard to the documents proved in evidence, it could not well be found to be otherwise. That case was not put forward in argument on this appeal, so that the main question for the decision of the Board is whether the perpetual grant made by this *Cowle* of the 14th April, 1897, was, having regard to the evidence given in the case and the findings of the Munsif and the Subordinate Judge thereon as against the respondents, a valid disposition of the described portion of the immovable property of this Mutt. Their Lordships did not understand Mr. De Gruyther to contend on behalf of the appellants that the Shebait of the temple, such as that in this case, has, by virtue of his office, an absolute and unrestricted power to alienate the immovable property with which the temple is endowed, arbitrarily at his own will and pleasure, under any or all circumstances. His contention, as their Lordships understood it, was this: that the Shebait was not the owner of these lands, but stood towards them in a relation somewhat similar to that in which the guardian of an infant stands to the lands of the infant, and had similar powers of management and control; and that, accordingly, the Shebait has power and authority to alienate the lands in cases of necessity or for the benefit of the estate of the Mutt, and also power to carve derivative interests out of them. In support of this contention he cited the three following authorities amongst others: *Hunooman Pershad Panday* v. *Munraj Koonweree* [1], *Prosunno Kumari Debya* v. *Golab Chand Baboo* [2] *and Konwur Doorganath Roy* v. *Ram Chunder Sen and others* [3].

It is necessary in order to ascertain the sense in which such general and elastic terms as "necessity" and "benefit of the estate" were used in these authorities to examine the facts in reference to which the terms were used. In the first case a certain mortgage executed by a Ranee in her character, as was found, of

1. (1856) 6 M. I. A. p. 393. 2. (1875) L.R. 2 I. A. 145.
3. (1876) L.R. 4 I. A. 52.

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the guardian of her infant son and manager of his estates, was impeached. By it these estates were charged with the payment of a debt due by the deceased father of the infant to the mortgagee, and already secured upon the property; and also charged with the payment of a sum advanced by the mortgagee to be applied in payment of the arrears of revenue due to the Government in respect of these estates, and thus save them from sequestration. There was no suggestion that the debt of the infant's father was contracted for illegal or immoral purposes. It was not disputed that according to Hindu law a son is bound to pay his father's debts if not of this character, and that the ancestral property descending to the son may be charged by him with payment of them. Well, it is clear that no greater benefit could well be conferred upon an estate than to save it from extinction by sequestration, the payment of the arrears of revenue by the mortgagee was therefore in the nature of salvage expenditure. The case was not finally decided by the Board. It was sent back to the Court below for further enquiry on some of the many points raised; but to prevent a further miscarriage Lord Justice Knight Bruce thought it right to state the general principles to be applied to its final decision. His words so much relied upon, reported at p. 423, run as follows :—

"The power of the manager for an infant heir to charge an estate not his own is under the Hindu law a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure, on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded."

He continues at p. 424 :—

"Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that, if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that under such circumstances he is bound to see to the application of the money."

In that particular case in reference to which this language was used the "necessity" for the loan would appear to be plain and imperative, the benefit to the estate, the preservation of its existence, obvious. Moreover, the transaction impeached was not

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an absolute alienation of property, but merely a pledge of it which might at any time be redeemed. The case in no way resembles the present case. In the second case the Rajah Baboo, the Shebait of an idol, a man of profligate habits, having spent the income of the debottar property on his own pleasures, borrowed a sum of 4,000 rupees from the respondent, and, by a bond and rahinama, pledged the debottar property for the payment of this sum. In both these securities it was stated that the money was borrowed for the services of the idol and the expenses of the temple. The Zillah Judge before whom the case was tried held as a fact that the money had been borrowed and expended for these purposes. Two decrees were obtained by the respondent, the lender, against the Shebait, each directing that the debt should be paid by the Shebait personally, or else be realised out of the profits of the debottar land. The appellant, the successor in office of Rajah Baboo, instituted a suit to set aside these decrees and have the debottar property released from an attachment issued in execution of them. The point decided was that the decrees, being untainted by fraud or collusion, and having been passed after the necessary and proper issues had been raised and determined, had the force of judgments of a competent Court, and were binding on the appellant, the succeeding Shebait, who was a continuing representative of the idol's property. Though the question was not raised whether the debottar lands themselves could be sold under the abovementioned decrees, the passage from the judgment of Knight Bruce, L. J., above extracted, was quoted, and some observations were made by Sir Montague E. Smith, who delivered the judgment of the Board, touching the alienability of debottar land, which have been relied upon. First, the learned Judge said :—

" There is no doubt that as a general rule of Hindu Law, property given for the maintenance of religious worship and of charities connected with it is inalienable."

and then after quoting a passage from the judgment of Lord Chelmsford in a case to be presently referred to, he, at p. 151, proceeds thus :—

" But notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is in their Lordships' opinion competent for the Shebait of property dedicated to the worship of an idol, in the capacity as Shebait and manager of the estate to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions

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of the idol, defending hostile litigious attacks and other like objects. The power however to incur such debts must be measured by the existing necessity for incurring them. The authority of the Shebait of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir as defined in a judgment of this Committee delivered by Lord Justice Knight Bruce."

On the next page he adds :—

"It is only in an ideal sense that property can be said to belong to an idol; the possession and management of it must, in the nature of things, be entrusted to some person as Shebait or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and perservation of its property at least to as great a degree as the manager of an infant heir. If this were not so the estate of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and maintain them."

In the last case the grandmother of the appellant executed a mokurruri pattah to a certain person, predecessor in title of the respondents, of certain lands, receiving a premium of 1,900 rupees and reserving the substantial rent of 325 rupees per month. She subsequently, by an instrument styled in the judgment a bill of sale, in consideration of the sum of 1,700 rupees, conveyed to a person therein named 300 rupees per month, portion of the rent so reserved. In the first of these documents it is in effect stated that the temple named was out of repair and the premium paid was required by the grantor to put it into repair, and to procure various other things requisite for the service of the idol. And in the second it was stated that the Ranee, the grantor, had, "agreeably to the instructions of her late husband, commenced to build certain temples named in the deed and others, but being in want of funds was unable to carry out her husband's instructions." The suit was brought to have these instruments set aside, on the ground that the land alienated was debottar property.

Whether it was so or not was the main issue in the case. It was held by this Board that it was not debottar property at all. No proof whatever was given that the statements contained in the deeds were true in fact, and the observations contained in the judgment of the Board at pages 62 and 64 of the report are based upon the suppositions that the land granted was in fact debottar land and that the aforesaid statements were in fact true. On these assumptions the alienations were considered to be justifiable. At page 64 of the report the following passage will be found :—

"Here it cannot be said the grant of a mokurruri pattah was an improvident way of raising money, if it were necessary to do it at all. It still left a rent for

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the sustentation of the idol, and if the transaction be *bona fide* the subsequent sale of part of the rent was justified by the imperious necessity of finishing the temple which had been commenced."

So that the only specific point touching the present case actually decided in these three authorities was this, that a debottar estate may be mortgaged to secure the repayment of money borrowed and applied to prevent its own extinction by sequestration. No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description "Benefit to the Estate." It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not. Three authorities have been cited which establish that it is a breach of duty on the part of a Shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debottar lands at a fixed rent, however adequate that rent may be at the time of granting, by reason of the fact that by this means the debottar estate is deprived of the chance it would have if the rent were variable, of deriving benefit from the enhancement in value in the future of the lands leased. These authorities are *Maharanee Shibessuree Debia* v. *Mothooranath Acharji* [1]; *Seena Peena Reena Mayandi* v. *Chockkolingam Pillay and Others* [2]; *Abhiram Gosawmi and Another* v. *Shyama Charan Nandi and Others* [3].

No doubt these cases dealt with agricultural lands, but no reason can be suggested why the principles they establish should not apply to a building site situate in the street of a village, as is the site in the present case. It may appreciate in value just as the land may. Moreover, if for the reasons above mentioned the grant of a lease in perpetuity of debottar lands at a fixed rent requires to be justified by unavoidable necessity, it is difficult to see why an absolute alienation in perpetuity of the same kind of land in consideration of a premium should not equally require to be justified by the same kind of necessity, since it brings about quite as completely the same prejudicial results. It has been urged on

1 (1869) L. R. 13 M. I. A. 270, 275.

2. (1904) L. R. 31 I. A. 83, 88=14 M. L. J. 200.

3. (1909) L. R. 36 I. A. 148, 165=19 M. L. J. 530.

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behalf of the appellants that the premium of rupees 93 : 12 : 0 if lent or invested at interest in India would bring in an income of 10 rupees per annum; that a rent of 10 rupees per annum would be quite an adequate rent for this site; that the *Cowle* of the 14th of April, 1897, must therefore be regarded as a grant in consideration of a sum equal to the capitalised value of this adequate rent, and that the charity will therefore be benefited by a transaction which put at the Shebait's disposal a sum capable of being so profitably used. But attractive and lucrative as money-lending may be in India, it is needless to point out that a Shebait would not be justified in selling debottar land solely for the purpose of getting capital to embark in the money-lending business. And no authority has been cited giving any countenance to the notion that a Shebait is entitled to sell debottar lands solely for the purpose of so investing the price of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, the debottar land itself.

So much for the " benefit to the estate " of the charity alleged to result from this transaction. Next, as to the imperative necessity constraining the Shebait to enter into it. There is not a suggestion that he needed this sum of rupees 93 : 12 : 0 for any of the purposes of the charity he managed. Neither is there any proof that any effort was made to lease this site for a term, or even grant it in perpetuity, at a variable rent.

From the letter of the first appellant, dated the 6th April, 1897, it would appear that he was quite willing to pay an annual rent for it. No doubt the rent offered was very small, apparently because he bound himself to use the building to be erected for an Annathanam Mutt. But as that was a charity separate and distinct from, and unconnected with, the temple and the worship of its idol, this obligation could not furnish any proper ground for accepting from him a lesser rent or a smaller premium than should be demanded from one not so bound, because a Shebait is not entitled to alienate part of the endowment of his own charity to enrich another and altogether separate and alien charity. The grant of the *Cowle* may have been an easy and convenient way of getting the nuisance upon the site abated; but in their Lordships' view the evidence does not establish that the Shebait was constrained by any necessity (as that term is in such a connection understood) to make this grant, or that any benefit accrued to the charity

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estate from the making of it. If the matter stood thus, their Lordships would be clearly of opinion that the *Cowle* was, as against the successor in office of the grantor, invalid, and that the appeal must fail.

It is contended, however, that the Munsif has found that there prevails in this village, and presumably in the surrounding district, at all events in this village, a local custom authorising and empowering a Shebait to do as against his successor what the ordinary law, as settled by the above-quoted authorities say he cannot legally do, namely, alienate debottar lands at a fixed rent or in consideration of a premium, whether he be constrained so to do by some necessity or the contrary, and whether the alienation be a benefit to the debottar estate or not. This is a custom entirely modifying the law. Their Lordships are of opinion that no such custom has been established here.

It has, however, been pressed on behalf of the appellants that there are two findings: one by the Munsif, and one by the Subordinate Judge, who agrees with him that the ancient custom relied upon has been proved, and that, as that is an issue of fact, it must be accepted. No doubt two findings upon questions of pure fact must be accepted by this Board, but questions of the existence of an ancient custom are generally questions of mixed law and fact; the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law—not fact. The second answer is that neither of these Judges has found that any ancient custom such as modifies the law existed in this locality. The Munsif sets out, at p. 212 of the record, the finding he arrived at in these words:—

"I must find that for a very long time permanent leases of temple land are being granted, and that the alienees are in undisputed possession thereof."

The Subordinate Judge, at p. 230, states his finding in these words:—

"If custom were needed to justify such a grant, the District Munsif has found upon the evidence (and I agree in his finding) that such local usage does obtain in the village in question. The custom is perfectly reasonable, and is not opposed to public policy."

There could scarcely be a more glaring instance of the misapplication of the word custom, or a more remarkable instance of forgetfulness of essentials of a custom which modifies the ordinary law,

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Their Lordships are clearly of opinion on all the points raised that the decision appealed from was right and should be affirmed, and this appeal be dismissed; and they will humbly address His Majesty accordingly.

The appellants must pay the costs here and below.

Solicitors for Appellant:—*Douglas Grant.*

Solicitors for Respondent:—*Chapman-Walker and Shephard.*

A. P. P.

PRIVY COUNCIL.

PRESENT:—VISCOUNT HALDANE, LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

Sahu Ram Chandra and another ... *Appellants**

v.

Bhup Singh and others ... *Respondents.*

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Hindu Law—Mitakshara—Joint family property—Father's powers of disposition—Mortgage or sale for an antecedent debt only valid if there be real dissociation in fact-Pious obligation of sons and grandsons to discharge father's debts only arises on father's death—Legal necessity—Burden of proof.

Under the law of the Mitakshara, the joint family property cannot be the subject of a gift, sale or mortgage by one coparcener except with the consent, express or implied, of all the other coparceners.

The father, in his capacity of manager and head of the family, is at liberty to affect or dispose of the joint family property for estate or family necessity, but otherwise he has no power of sale or mortgage except for an antecedent debt.

A borrowing made on the occasion of the grant of a mortgage is not such an antecedent debt. The exception applies only to the case when the debt has been incurred irrespective of the credit obtained from the joint family property. In order to validate a mortgage for an antecedent debt not only antecedency in time but real dissociation in fact is required.

The obligation of religion and piety which is placed upon sons and grandsons under the Mitakshara Law to discharge their progenitors' debts, does not attach while the said progenitors are alive.

The doctrine of onus probandi, in cases where legal necessity is alleged, is largely based upon the necessity of protecting the rights of third persons. There is no hard and fast rule, and the presumption proper to be made must depend on the circumstances of each case. In the present case where the mortgagees sued after 27 years, nothing having been done on the mortgage in the interval.

Held, that the onus of proving legal necessity had been properly laid on plaintiffs.

Appeal from a decree of the Allahabad High Court (Sir Henry Richards, C. J. and Lyle, J.,) confirming a decree of the Subordinate Judge of Mainpuri.

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* 25 and 26 January, 1917.

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Sahu Ram Chandra v. Bhup Singh.

Bhup Singh (defendant No. 1) was father or grandfather of the remaining defendants. Defendants were a joint Hindu family of which Bhup Singh was the head. In 1882 Bhup Singh hypothecated to Thakur Churon Singh one biswa *zemindari* share in Mouza Pendat, which share was the property of the joint family. In 1883 he mortgaged the said property to one Bhagirath for Rs. 200 bearing interest at Re. 1-8 per mensem. The mortgage deed recited that he did this "to meet his necessity." In 1884 he again mortgaged the said property to plaintiff Sahu Ram Chandra. In 1893 the latter sued on his mortgage and got a mortgage decree subject to his redeeming Bhagirath's mortgage, the amount due to whom was then fixed at Rs. 200 principal and Rs. 37-10-0 interest. Sahu Ram Chandra paid this, and the mortgage deed in favour of Bhagirath was thereupon made over to him.

Plaintiffs sued on this latter mortgage in 1910 and alleged, notwithstanding the above, that nothing had been paid and that the amount due was Rs. 22,131-9-0. They valued the suit however at Rs. 15,000 only, on the allegation that the mortgaged property was not worth more. They alleged that the loan was taken "to meet lawful necessity." This defendants denied. Defendants also set up a settlement of the whole matter.

The Subordinate Judge disbelieved the defendants' evidence as to this settlement, but he held that the burden of proving necessity was on plaintiffs and that they had failed to discharge it. He dismissed the suit.

Plaintiffs appealed to the Allahabad High Court, but their appeal was dismissed. They therefore preferred the present appeal to the Privy Council.

De Gruyther, K. C., and *W. A. Raikes* for Appellants. Respondents did not appear.

De Gruyther, K. C., for Appellants : My propositions are (1) A son is bound to pay his father's debt unless it is contracted for immoral purposes (2) A father can dispose of family property for an antecedent debt.

The Courts in India have differred as to what is an antecedent debt. Where there is a mortgage there is a loan ; the mortgage in question was a simple mortgage as defined in S. 58 (b) of the Transfer of Property Act, and not as in England a conveyance subject to the right to redeem.

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It has been found the mortgage was not a necessity, and it is on the question as to the onus of proving necessity that the case has hinged in the Lower Courts: but it does not really turn on necessity at all. What I rely on is the second ground of appeal to the High Court, that quite irrespective of necessity "it was for the sons and grandsons of Bhup Singh, the mortgagor, to set and prove the invalid nature of the debt before they could resist the claim for sale of the property."

There is no doubt whatever that the father can sell the family property outright for his antecedent debt; the point is whether he can mortgage it. The High Court on the authority of *Chandradeo Singh* v. *Mata Prasad* [1] have held he cannot, they held that a debt is not antecedent "if it is incurred at the time of the mortgage." I submit this view is wrong, and that a mortgage is necessarily for an antecedent debt.

The Indian decisions have turned on the view taken by the various High Courts as to the effect of the language used by this Board.

Reference was made to *Maheshur Dutt Tewari* v. *Kishen Singh* [2]; *Kishun Pershad Chowdhri* v. *Tipan Pershad Singh* [3]; *Babu Singh* v. *Behari Lal* [4]; *Chidambara Mudaliar* v. *Kootha-perumal* [5]; *Venkataramana Pantulu* v. *Venkataramana Doss Pantulu* [6]; *Dattatraya Vishun Dhamankar* v. *Vishun Narayan Dhamankar* [7].

That a mortgage for an antecedent debt can be enforced appears from this Board's judgment in *Bhagbut Pershad* v. *Musummat Girja Koer* [8], where the question was whether the burden was on the sons to prove the immoral nature of the debt or on the mortgagee to prove necessity, and it was held, the former. The foundation of the obligation is the pious duty of the son to pay his father's debts. The subject is discussed in S. 303 of Mayne' Hindu Law, and the following decisions of this Board are in point. *Hunoomanpersaud* v. *Mussummat Babooe Munraj Kon-waree* [9], which laid down two propositions (1) that the son is bound to pay the father's debts (2) that the father can mortgage

1. (1909) I. L.R. 31 A. 176 F B.
2. (1907) I. L. R. 34 C. 184.
3. (1907) I. L R. 34 C. 735.
4. (1908) I. L. R. 30 A. 156.
5. (1903) I. L. R. 27 M. 326=14 M. L. J. 181.
6. (1905) I. L. R. 29 M. 200=16 M. L. J. 69.
7. (1911) I. L. R.36 B. 68.
8. (1888) L. R. 15 I. A. 99.
9. (1856) 6 M. I. A. 393.

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the family property to discharge his own debts. *Girdhari Lal* v. *Kanta Lal* [1]; *Suraj Bunsi Koer* v. *Sheo Prashad Singh* [2]; *Mussammat Nanomi Babuasin* v. *Madun Mohun* [3]; *Meenakshi Naidu* v. *Immudi Kanaka* [4]; *Rai Babu Mahabir Pershad* v. *Rai Markunda Nath Sahai* [5].

The Full Bench decision of the Allahabad High Court in *Chandra Deo Singh* v. *Mata Prasad* [6], reviews all the decisions up to that date. That decision itself was a decision of three Judges against two. The question has sometimes been treated as one of burden of proof, I submit it is not so much that, as a question of what you have to prove.

[*Viscount Haldane*: The point raised by Stanley, C. J., is whether a mortgage for an immediate advance is more of the nature of an alienation or of a debt?]

The cases are all founded on the sons' liability to pay debts, not on the liability to pay antecedent debts. I contend that in every mortgage there is an antecedent debt, but if that be held against me, I contend further that the distinction of debt and antecedent debt is immaterial. If a sale is for debt of course the debt must be antecedent: it does not follow that a mortgage is invalid because the debt is not antecedent. In *Babu Singh* v. *Behari Lal* [7] and in *Dattatraya Vishun* v. *Vishun Narayan* [8], there was no antecedent debt, yet the mortgages were enforced against the sons: the latter decision of the Bombay High Court is subsequent to the Allahabad Full Bench decision from the principle of which this is practically an appeal.

[*Viscount Haldane*: Is there any decision of this Board which treats the bond in a mortgage as an antecedent debt?]

Not where the point has been specifically raised. But it has in fact been so treated in *Bhagbut Pershad* v. *Mussummat Girja Koer* [9] and in *Meenakshi Naidu* v. *Immudi Kanaka Ramayya Gounden* [4].

The question now at issue was considered by a Full Bench of the Calcutta High Court in *Luchman Das* v. *Girdhur Chowdhri* [10] and decided against me. That decision was followed in Calcutta

1. (1874) L. R. 1 I. A. 321.
2. (1879) I. L. R. 6 I. A. 88, 104.
3. (1885) L. R. 13 I. A. 1.
4. (1888) I. L. R. 16 I. A. 1
5. (1889) L. R. 17 I. A. 11.
6. (1909) I. L. R. 31 A. 176.
7. (1908) I. L. R. 30 A. 156.
8. (1911) I. L. R. 36 B. 68.
9. (1888) L. R. 15 I. A. 99.
10. (1880) I. L. R. 5 C. 155.

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till *Maheshwer Dutt Tiwari v. Kishun Singh* [1], where the Judges held that it had been overruled by later decisions of the Privy Council.

Another Bench of the same High Court however, in *Kishun Pershad Chowdry* v. *Tapan Pershad Singh* [2] dissented from the latter decision, and held that the old Full Bench decision was still binding on them. The point really is, whether there is a debt for which the sons are liable. As to the form of the action in such cases, see *Badri Prasad* v. *Madan Lal* [3] The Action is brought against the father (p. 82) to enforce the mortgage, and the sons are joined under S. 85 of the Transfer of Property Act as they have an interest in the mortgaged property and in order that further proceedings in execution may bind them. The view of the Calcutta High Court is that there should be a personal money decree. Turning to the Madras decisions, *Venkataramana Pantulu* v. *Venkataramana Doss Pantulu* [4] merely follows, without any additional reasoning the decision in *Sami Ayyangar* v. *Ponnammal* [5] which was dissented from in *Chidambara Mudaliar* v. *Koothaperumal* [6].

[*Lord Shaw:*—This Board's decisions deal with cases where third parties have derived rights and the sons come to challenge.]

There was no third party in *Bhagbut Pershad* v. *Mussummat Girja Koer* [6].

W. A. Raikes followed; There is documentary evidence, not dealt with by either of the Lower Courts, supporting our contention that there was necessity for the mortgage.

[*Lord Shaw* :—There are concurrent findings of fact on that issue.]

Their Lordships' judgment was delivered (March 9, 1917) by

Lord Shaw.

Lord Shaw :—This is an appeal from a judgment and decree of the Allahabad High Court dated the 26th May, 1913, which confirmed on an appeal the judgment and decree of the Subordinate Judge of Mainpuri dated the 29th February, 1912.

The suit is brought to enforce a mortgage granted so far back as the 6th January, 1883, over, *inter alia*, one biswa zamindari share in Mauza Pendat, Pargana Mustaphabad. The mortgage was granted in favour of one Bhagirath. It was paid off by Ram

1. (1907) I.L.R. 34 C. 184.
2. (1907) I.L.R. 34 C. 735, 746.
3. (1893) I.L.R. 15 A. 75 (F. B.)
4. (1900) I. L. R. 29 M. 200.
5. (1897) I. L. R 21 M. 28.
6. (1903) I. L. R. 27 M 326.

Chandra, one of the defendants, in the course of an action brought by him to enforce a subsequent security granted over the same property. It appears from the judgment appealed from that the plaintiffs proceeded against the property comprised in their own mortgage and that the decree-holders purchased the property themselves. All this happened over twenty years ago. It is manifest from these facts that, in so far as the advance of 200 rupees was concerned, a claim for repayment of it as a simple debt would be long ago barred by limitation.

Accordingly, it is the mortgage which is sued upon, and the plaintiffs claim as standing in right of it, they having discharged the debt of Bhagirath, the original mortgagee. Their Lordships had not the advantage of hearing any argument in support of the judgment appealed from, the respondents not being represented by Counsel; but there is sufficient in the case to suggest that other elements going to dispute the validity of the appellant's claim might have been brought before the Board. Their Lordships, however, were willing to consider the arguments submitted to them upon the one particular point hereafter to be explained, and they agree with the argument of the learned Counsel for the appellants that, in view of a certain conflict of decisions in the various Courts in India, it may be well that the point should be settled.

The mortgagor was the defendant, Bhup Singh. The other defendants are his sons and grandsons. Under the Mitakshara Law they are, as members of a joint family, coparceners in the ownership of the property over which the mortgage was granted.

It is well to keep the general principle applicable to such a situation in mind. There have been so many decisions by courts of law on the exception to the principle that the principle itself has been apt to be forgotten. Under the Law of the Mitakshara the joint family property owned, as stated by all the members of the family as coparceners, cannot be the subject of a gift, sale, or mortgage by one coparcener except with the consent, express or implied, of all the other coparceners. Any deed of gift, sale, or mortgage granted by one coparcener on his own account of or over the joint family property is invalid; the estate is wholly unaffected by it, and its entirety stands free of it.

The rule of the Mitakshara is clear (I, 1, 7): even the father—

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"Is subject to the control of his sons and the rest in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained 'though immoveables or bipeds have been acquired by a man himself a gift or sale of them should not be made without convening all the sons.'"

The Law of the Mitakshara has, however, given to the father in his capacity of manager and head of the family certain powers with reference to the joint family property. The general principle in regard to that matter is that he is at liberty to affect or to dispose of the joint property in respect of purposes denominated necessary purposes. The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or, *muth*, or of the guardian of an infant family. In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by the transaction. It is not accurate to describe this as either inconsistent with or an exception to the fundamental rule of the Mitakshara. For where estate or family necessity exists, that necessity rests upon the coparceners as a whole, and it is proper to imply a consent of all of them to that act of the one which such necessity has demanded.

This view is in no way novel. In *Suraj Bansi Koer* v. *Sheo Pershad Singh*, [1] Sir James Colvile said :—

"All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the coparceners, and that such an authority will be implied at least in the case of minors, if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether, in order to bind adult coparceners, their express consent is not required."

But for the exception immediately to be noted, these two principles would cover the ground, and it would be clear that if the father of a family purported or presumed to mortgage or sell the joint family estate, the mortgage or sale would be entirely ineffectual.

Before dealing with that exception, their Lordships desire to note an argument presented, to the following effect. It was argued that a mortgage was binding because of an obligation of religion and piety which is placed upon the sons and grandsons, under the Mitakshara Law, to discharge their father's debts. If, accordingly, he has incurred a debt, and the debt was not for immoral purposes the pious obligation resting upon the sons and grandsons to

1. (1879) L. R. 6 I. A. 88.

discharge this debt is in practice worked out by giving effect to any mortgage or sale of the family property, in which they, with the father, its manager, were joint owners, so as to enable the debt to be discharged.

While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing. Accordingly, the case founded merely upon pious obligation, and so strenuously argued before the Board, fails in the present instance by reason of the fact that Bhup Singh, who contracted the debt, is still alive, and that there is a concurrent finding by both of the Courts below to the effect that the plaintiffs have failed to prove that the debt of 200 rupees, for which the mortgage was granted, was incurred for any legal necessity or benefit to the estate.

The whole of this part of the case is accordingly at an end. But while the principles as above set forth still stand, an appeal is made in this case to the following exception. Although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made to cover the case of mortgage or sale by the father in consideration of an antecedent debt. This being an exception from a general and sound principle, their Lordships are of opinion that the exception should not be extended and should be very carefully guarded. The desire, in the first place, to make it clear that much if not all of the law upon this subject has arisen from the necessity of protecting the rights of third persons, say the purchasers of the property who have taken their title for onerous consideration and in good faith. This is at the bottom of the doctrine of onus, which was dealt with so fully

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by Lord Justice Knight Bruce in *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree* 1.

" According to the argument, " said the learned Judge, " if a factum of a deed of charge by a manager for an infant be established and the fact of the advance be proved, the presumption of law is *prima facie* to support the charge and the onus of disproving it rests on the heir. "

His Lordship controverts any such general proposition, and decides that the onus of proof in such suits is one—

" not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances and must be regulated by and dependent on them. Thus where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate and the motives influencing his immediate loan. "

The point need not be pursued, because their Lorships are entirely satisfied with the position adopted by the Courts below in the present case.

For the facts are startling. The advance itself was for a trifling amount, namely, 200 rupees, but the interest was 1/8 per cent. per month compound. Accordingly the amount due upon the mortgage, if good and subsisting, was, as stated by the High Court, " the appalling sum of 22,131 rupees. " In point of fact, the mortgage is asked to be enforced for a sum of 15,000 rupees. The lapse of time between the date of the mortgage and the date of the suit was 27 years, nothing having been done upon it during that period. The onus was accordingly properly laid and the issue of no benefit to the estate is settled.

As has been already observed, too little weight has been attached to the consideration that, so far as the joint family estate is concerned, the law has been invoked for the protection of third parties, whose rights in or with regard to it have beeen acquired in good faith. A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up with regard to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head. In the case of *Suraj*

1. (1856) 6 M. I. A. 393.

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Bunsi Koer v. *Sheo Proshad Singh,* [1] already referred to, Sir James Colville, "referring to the case of *Girdhari Lull* v. *Kantoo Lull* [2] observed ;—

"1st. That were joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were contracted ; and

"2ndly. That the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."

Their Lordships desire to record their adhesion to the following comment made on this pronouncement by Sir John Stanley in the case of *Chandradeo Singh* v. *Mata Prasad,* [3]. The learned Chief Justice stated :—

The first of these propositions, it will be observed, deals with cases where joint ancestral property has passed out of a joint family either under a conveyance executed by a father *in consideration of an antecedent debt or* in order to raise money to pay off *an antecedent debt, or under* a sale in execution of a decree for the father's debt. It deals with cases in which ancestral property has passed out of the family, and with no other cases, and the words antecedent debt seem to have been used advisedly. Likewise the second proposition deals with the case of a purchase at an execution sale. Neither proposition touches a case in which a mortgagee of a Hindu father seeks to enforce his mortgage as against the sons."

In their Lordships' opinion this is a correct and useful statement of the law.

It need only be further stated that, while the case founded on family necessity is excluded, and while the case founded on pious obligation fails, there is a still more radical objection to the claim. It is denied that the mortgage can be held to have been granted for an antecedent debt. Antecedent debt, it is said, there was none, and to call a borrowing made on the occasion of the grant of a mortgage an antecedent debt is to extend unduly and improperly the whole scope of the exception on that topic. As to this unfortunately there has been much difference of view in the Courts in India.

The law was thus stated by Lord Hobhouse in *Mussumat Nanomi Babuasin* v. *Modun Mohun and others* [4].

"Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have, for some time, established the principle that the

1. (1878) L. R. 6 I. A. 88.
2. (1874) L. R. 1 I.A. 321.
3. (1909) I.L.R. 31 A. 176 at 196.
4. (1885) L.R. 13 I.A. 1, 17.

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sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think that there is now no conflict of authority."

In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply and to apply only, to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which do not personally belong to him, but are joint family property. In their view of the rights of a father and his creditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, viz., that no manager, guardian, or trustee can be entitled for his own purposes to dispose of the estate which is under his charge. In short, it may be said that the rule of this part of the Mitakshara Law is that the joint family estate is in this position : under his management he can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain and, it might be, a deliberate breach of trust. The Mitakshara Law does not warrant or legalise any such transaction.

The limits of the principle of the exception have been thus set forth because in their Lordships' opinion they form a guide to the settlement of the conflict of authority in India on the subject of antecedent debt. In the present case the question arises clear from all complications. A mortgage has been granted for 200 rupees advanced at the time and on the faith of it. This debt was not for the benefit of the estate, it was purely a debt of the father. It is boldly contended that the mortgage did from its date properly hypothecate the entirety of the joint family estate, and it is said that the transaction substantially is that the father

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got the 200 rupees into his hands, and that when he granted the mortgage he was accordingly an "antecedent debtor." Their Lordships are of opinion that the contention cannot be upheld.

The importance of the case being free from complications is this: that except under the mortgage all other remedies have long ago disappeared, and the appellants rear it up and claim under it now, there being no right in them to invoke the doctrine of the pious obligation to discharge the debt incurred by Bhup Singh, because that debt as such cannot be successfully sued for. Accordingly, unless the mortgage validly affects the joint family estate, the appellants must fail. In the view taken by the Board the mortgage was not granted in respect of an antecedent debt, and was invalid.

The conflict of authorities cited to the Board is a conflict which occurs, not merely between the Courts of one district in India and another, but also between decisions pronounced in Calcutta itself, in Allahabad itself, and in Madras itself. The cases particularly mentioned were as follows:—*Luchman Dass* v. *Giridhur Chowdhry* [1], *Maheswar Dutt Tewari* v. *Kishun Singh* [2], *Babu Singh* v. *Bihari Lal* [3], *Chandradeo Singh* v. *Mata Prasad* [4], *Sami Ayyangar* v. *Ponnammal* [5], *Chidambara Mudaliar* v. *Koothaperumal* [6], *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* [7], *Dattatraya Vishnu* v. *Vishnu Narayan* [8].

From this mass of authority their Lordships venture to refer to the judgment of Chief Justice Sir John Stanley, in *Chandradeo Singh* v. *Mata Prasad* [4] already mentioned:—

"The true rule," says that learned Judge, "is that the son cannot impeach an alienation of ancestral joint family property made by a father *for which the consideration is an antecedent debt of the father* not tainted with immorality or the object of which is to pay *such* a debt......the doctrine has no application to a case in which no antecedent debt of the father, that is, a debt antecedent to the alienation in question, is concerned as the consideration or object of the alienation."

The argument in support of the validity of the mortgage also took this shape. It was said, "What difference would it make if the father had contracted the debt an hour, a day, a year before

1. (1880) I. L. R. 5 C., 855.
2. (1907) I. L. R. 34 C. 184.
3. (1908) I. L. R. 30 A. 156.
4. (1909) I. L. R. 31 A. 176.
5. (1897) I. L. R. 21 M. 28.
6. (1903) I. L. R. 27 M. 326.
7. (1905) I. L. R. 29 M. 200.
8. (1911) I. L. R. 36 B. 68.

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granting the mortgage?" Then *de facto* it would be an antecedent debt, and the creditor would have a mortgage good upon that ground. Their Lordships cannot assent to any such proposition that a mortgage on the family estate would follow the loan. The case as put might instantly raise the presumption that what occurred was substantially this: that the father contracted the debt knowing that he was at the end of his personal resources and that the creditor advanced the money relying upon an understanding or agreement, express or implied, given to the father. In truth, in order to validate such a transaction of mortgage there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact. The Courts in India, wherever such antecedency is found to be unreal and is merely a cover for what is essentially a breach of trust, will not be slow to deny effect to a mortgage so brought into existence.

Their Lordships will humbly advise His Majesty that the appeal be disallowed.

Solicitors for Appellants: *T. C. Summerhays & Son.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, AND MR. JUSTICE SESHAGIRI AIYAR.

Kizhakke Meladathi Vidvan Kombi Achan styled Sekhari Varma Valia Raja Avergal of Palghat (deceased) and another. *Appellants* (Plffs. and his L. R.*

v.

Kannanpara Nair Veetil Karnavan Raman Unni *alias* Tharuvayur Pada Nair and others. *Respondents (Defendants 1 to 19, 21, 23, 25, 27, 29 to 33, 37 to 40).*

Rajah of Palghat v. Raman Unni

Limitation Act, S. 2 cl. (8) and Art. 124—Office of trustee of devaswom annexed to a Malabar stanom—Alienation of properties of devaswom by stani—Suit for recovery of possession by successor in stanom—Limitation.

The trusteeship of a devaswom and its properties was conferred by the Government on a Malabar *stani* to be held by him and his successors in the *stanom* as a hereditary office descendible in the same manner as the *stanom*. The *stani* purported to transfer absolutely his right of management of the devaswom and its properties to the predecessors-in-title of the defendants who thereupon assumed control and possession of the same. In a suit by a successor in the *stanom* for

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* A. S. No. 300 of 1914. 2nd February 1917.

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recovery of the devaswom properties, instituted more than 12 years after the date of the transfer by the preceding *stani* but within 12 years of the plaintiff's succession to the *stanom*, *held* that the plaintiff's claim was barred under Art. 124 of the Limitation Act.

A *stanom* according to the customary law of Malabar is descendible from one stanom-holder to another in a peculiar line of succession and each successive holder is in the same position as an ordinary heir succeeding on intestacy. Stanom-holders on whom property devolves by operation of law derive their title to sue from or through their immediate predecessors within the meaning of S. 2 (8) of the Limitation Act.

Appeal against the decree of the Subordinate Judge of South Malabar at Palghat in O. S. No. 44 of 1911.

T. R. Ramachandra Aiyar, A. Nilakanta Aiyar, and *P. V. Parameswara Aiyar* for Appellants.

C. V. Ananthakrishna Aiyar and *K. Kuttikrishna Menon* for the Respondent.

The Court delivered the following

The Chief Justice.

Judgments :—*The Chief Justice* :—In 1842 the Government of Madras by Exhibit A put the Rajah of Palghat in possession and management of the suit devaswom which is stated to have belonged to two persons whose family had become extinct. This is the grant relied on by the plaintiff and its validity had not been called in question. The Palghat Raj is a Malabar stanom, the succession to which is in the senior male member for the time being of a large number of families who are presumably descended from a common ancestress. The grant of this and the other devaswoms included in Ex. A was made in pursuance of the policy adopted by the East India Company about this time of divesting itself of the direct management of religious institutions, and was intended in our opinion to confer the office of trustee of these various endowments on the Rajah and his successors in the stanom as a hereditary office descendible in the same manner as the stanom. This is not now contested for the respondents, and the only question before us is whether the suit to recover possession of the kanom properties is barred by limitation under Art. 124 of the Limitation Act as held by the Subordinate Judge. After the very full arguments we have heard I am of opinion that this is the article applicable and that the suit is barred under it if it was not already barred under the Regulation and the previous Limitation Acts. According to the finding of the Subordinate Judge which had not seriously been disputed before us, the defendants' family have been in possession since 1843 when the

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then Rajah purported to assign the devaswom to them under Ex. 1, Art. 124 fixes the period of limitation at 12 years from the date "when the defendant takes possession of the office adversely to the plaintiff," and Mr. Ramachandra Aiyar's main argument was that the previous holders of the stanom were not persons "from or through whom the plaintiff derived his right to sue" and so do not come within the definition of plaintiff in S. 2 of the Limitation Act. According to him each successive holder of the stanom who brings a suit falling under Art. 124 or 144 can only be barred under these articles if there is possession adverse to himself for the requisite period, as possession adverse to his predecessors cannot be taken into account not being possession adverse to the plaintiff within the meaning of the Act. I am wholly unable to accept this contention. A stanom according to the customary law of Malabar is descendible from one stanom holder to another in a peculiar line of succession, and it appears to me each successive holder is in the same position as an ordinary heir succeeding on intestacy In either case it is the law of the land and not any act of the previous holder or owner that confers title on the successor. The fact that the law of the land confers limited powers of disposition in one case and unlimited powers in the other case can make no difference. In both cases it seems to me that for the purposes of the definition of plaintiff in the Limitation Act, which is intended to include predecessors in title of whom the successor is the representative, the heir must be considered to derive his title from and through the purchaser and the intermediate holders or owners who have taken by inheritance. It would defeat the whole scheme of the Limitation Act to hold that adverse possession against the predecessors of an owner taking by inheritance was of no avail against such owner unless it could be shown that the owner derived title from him otherwise than by inheritance, and I think as I have already said that the succession to mutts, stanom, etc., stands in the same footing. As regards cases of ordinary succession I am not aware that this has ever been questioned, but if authority be wanted, it is to be found in the decision of the Privy Council on this very article 124, in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* 1. There is also a strong current of authority in this Court on the present question. Subrahmania Aiyar, J., in his re-

1. (1899) I. L. R, 23 M. 271 at 231=10 M. L. J. 29 (P. C.)

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ference to the Full Bench in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* [1], refers to the decisions in which succeeding trustees, Mahants and Malabar Stanis have been treated as claiming through or under their predecessors, and these decisions are approved in the opinion of the Full Bench at page 409, subject no doubt to the observation which was unnecessary for the decision, that they did not in strictness so claim from or through the predecessors. *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* [2], deals with the case of trustees, *Sankaran* v. *Krishna* [3], proceeds upon the same view in the case of stanis, as though Art. 124 was not considered to apply—why is not apparent. It was held that the suit might be governed by Art. 144 which equally raises the present question. See also *Pydigantam Jagannadha Row* v. *Rama Doss Patnaik* [4], *Ambalavana Pandara Sannadhi* v. *Sree Minakshi Devastanam* [5]. Mr. Ramachandra Aiyar relied on a dictum of the Privy Council in *Runchordas* v. *Parvatibai* [6], that the plaintiff who sued as next reversioner after the death of the widows of the last male owner did not derive his title from or through the widows and the extinguishment of their right could not extinguish his. In my opinion this means at most that under the existing and recent Limitation Acts which give the reversioner a fresh starting point from the death of the widow under Art. 141, a reversioner cannot be treated as claiming from or through the widow. Prior to the introduction of Art. 141 the next reversioner was held to claim from or through the widow, *Amritolal Bose* v. *Rajoneekant Mitter* [7] and *Sambasiva* v. *Ragava* [8]. However this may be, this dictum which was not in any way the ground of their Lordships' judgment must in my opinion be strictly confined to the case of widows and is no authority for the position that other persons such as ordinary heirs, stanom-holders, Mahants on whom property devolves by operation of law do not derive their title to sue from or through their immediate predecessors within the meaning of S. 2 of the Indian Limitation Act. In the event the suit is dismissed with costs of the 1st respondent.

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1. (1906) I. L. R. 29 M. 390, 396=16 M. L. J. 307.
2. (1899) I. L. R. 23 M. 271 at 281=10 M. L. J. 29 (P. C.)
3. (1893) I. L R. 16 M. 456.
4. (1904) I. L. R. 28 M. 197.
5. (1914) 28 M. L. J. 217.
6. (1889) I. L. R. 23 B. 725.
7. (1875) 15 Beng. L. R. 10.
8. (1890) I. L. R. 13 M. 512.

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Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—I agree. The short point for consideration is whether the plaintiff, the Rajah of Palghat, or the defendants' tarwad is entitled to the hereditary trusteeship of the plaint Devaswom. Till 1843, the Government managed it under Regulation VII of 1817. In that year, they transferred the management to the then Palghat Rajah (Vide Exhibit A) presumably under Section 13 of the Regulation. The Subordinate Judge considers that the transfer was to the then Rajah, as an individual, and that the succeeding Rajahs were not entitled to the management. He is clearly wrong in this view. Mr. Ananthakrishna Aiyar, a learned Vakil for the 1st respondent, did not endeavour to support him on this point. The first Rajah executed Exhibit I to the ancestors of the deft. What it exactly conveyed has been the subject of controversy. Acting on Exhibit I the defendants' ancestor asked the Collector of Malabar to recognise him as the Uralan of the Devaswom. The Collector refused to deal with him in that capacity, Exhibit D. Then followed some correspondence with the Rajahs. Exhibits XII, C and F show that the Collector treated the successors of the first Rajah as the proper trustees. Exhibit F. is an extract from the Inam register showing that the then Rajah was the trustee. By Exhibits IX and X, the 3rd Rajah constituted the defendants' ancestor, the manager of the Devaswom. This was in 1851. There is no evidence whether from the date of Exhibit A, the defendants' ancestor had possession of the temple properties. The above documents make it abundantly clear that the Government transferred the right of management to the holder of the Raj as such. The practice followed in this case has been the recognised mode of dealing with Devastanams by the Government in the years 1842 and 1843. The cases of the Mahants of Tripathi and of the Jeers of the Ahobilam mutt, show that the Government in divesting themselves of their responsibility assigned their rights to persons holding particular positions who were expected to transmit those rights to their successors in office.

Further, Exhibit I leaves very little room for doubt that the right was intended to be vested in the Rajah for the time being. The Rajah was asked to "manage the affairs of the Devastanams in the same way as he managed the affairs of his own temples." This shows that the management was to be by the Rajah for the time being. I have no hesitation therefore, in holding that Ex. A was a grant to the Rajahs of Palghat, and that the Plaintiff is

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entitled to manage the affairs, if he has not lost the right by prescription or has not been barred by limitation.

Mr. Ramachandra Aiyar, for the appellant, contended that the Government created a succession of life estates by Exhibit A. The learned Vakil's argument is that the document was intended to operate as a fresh grant of trusteeship in the case of each succeeding Rajah. *Gulabdas Jugjivandas* v. *The Collector of Surat*, [1] and *Marium Begum* v. *Mirza* [2] show that the creation of successive life estates is within the competence of the Government, although the Tagore case holds that private individuals should not create a line of succession unknown to the law applicable to them. But, there is nothing in the language of Exhibit A to warrant the construction that a fresh grant in the case of each of the Rajahs was in the contemplation of the Government. It seems to me that the Government were content to leave the devolution of the right to be regulated in the same way as succession to the Raj or to the management of the family Devaswom was done.

The claim of the defendants is based both on prescription and on limitation. The grant to their ancestor (Exhibit I) seems to convey the absolute right of management. Exhibits IX and X also are to the same effect. But it is clear that such an alienation is invalid. This is settled law. *Vide Rajah Varman Valia* v. *Ravi Varmah Mutha* [3]. It is conceded, however, that the defendants and their ancestors have been managing the Devaswom for over 60 years.

The main argument of Mr. Ramachandra Aiyar was that the cause of action accrued to the plaintiff when he became the Rajah and that as the suit was within 12 years of his succession, his right was not barred. On the question of prescription, his answer was that adverse enjoyment against the previous rajahs could only deprive them of their rights but was ineffective to affect the rights of his client who claimed in his own right and not as heir to the late Rajah.

A very learned argument was addressed to us on the legal position and right of Malabar Stanis. It has been stated by the highest authority that their position is analogous to that of Hindu widows. *Venkateswara Iyan* v. *Shekhari Varma* [4]. I took the

1. (1878) I. L. R. 3 B. 186.
2. (1889) I. L. R. 17 C. 234.
3. (1876) L.R. 4 I.A. 76=I.L.R. 1 M. 235 P.C.
4. (1881) I.L. R. 3 M. 384.

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same view in *Patinharkara Vallabhan Chattan Raja* v. *Rama Varma* [1]. It does not follow from these decisions that the Stani is bound by the same limitation as a widow is. It is true that like the widow he holds his property for life; but beyond this, the analogy does not go. There is no one who corresponds to the reversioner. The next in succession is his own heir. The fact that in Sthanams, the strict rule of Marumakkathayam succession is not followed is no reason for saying that the successor is not the heir of the last Sthani. Most of the important Sthanams have secondary Sthanams. On the death of the first Sthani, the person at the head of the next Sthanam succeeds.

The important pre-requisite in all these cases is that the first and the other Sthanams should all be held by the members of the same family. I do not think that this customary rule of succession offers any ground for the suggestion that each succeeding Sthani is not the heir of his predecessor in office. In the East Coast Mutts, the successor is nominated. In the case of the Mahants, priority of discipleship regulates the succession. It is not correct to argue that in observing these customary rules of devolution of right, the successor does not become the heir of the previous holder of the office. The position of a Sthani approximates more to that of an owner of an impartible estate under the Act than to that of a widow.

There can be no question that the article of limitation applicable to the suit is 124. It was contended by Mr. Ramachandra Aiyar that even if the article applied, the suit was not barred by limitation. His argument was that the office could not be said to have been taken adversely to the plaintiff, until the plaintiff succeeded to the Raj. There is great force in this contention. The effect to be given to it depends upon the meaning to be attached to the word *plaintiff* in article 124. The definition in Section 2 clause (8) of the Limitation Act is not exhaustive. The use of the word "includes" shows that. Apart from this reservation, I am unable to hold that the present plaintiff did not derive his title from his predecessors. The holders of the Palghat Raj may be aptly described in respect of the Devaswoms as forming a chain of trustees. That is the only *locus standi* they have to claim to manage the trust. In that view it is clear that the plaintiff and his predecessors continuously represented the

1. (1914) 28 M. L. J. 669.

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trust property. This was enunciated by the Judicial Committee in *Prosunno Kumari Debya* v. *Golab Chand Baboo* [1]. At page 256 it was stated "It appears to be right and reasonable that judgments obtained against a former shebait in respect of debts so incurred should be binding upon succeeding shebaits, who, in fact, form a continuing representation of the idol's property." In *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* [2], the Privy Council did not accept the theory that each trustee became entitled to the management *per formam doni.* Reviewing all the previous decisions, Banerjee and Gordon, JJ. say in *Nilmony Singh* v. *Jagabandhu Roy* [3]. "But that does not show that each succeeding manager gets a fresh start as far as the question of limitation is concerned, upon the ground of his not deriving title from any previous manager. The succeeding shebaits as was observed in the case just referred to, formed a continuing representation of the idol's property. If we were to hold otherwise, it would lead to a most anomalous result; for then it would follow that, although after any alienation of the idol's property, ten successive shebaits may not take any steps to recover the idol's property, the 11th shebait, it may be after a hundred years or more, would still be in time to institute a suit fot recovery of possession. Such a result the Legislature could not have contemplated." These observations are exactly in point. *Veerabhadra Varaprasada Row* v. *Vellanki Venkatadri* [4], *Sankaran* v. *Krishna* [5], *Pydigantam Jagannadha Row* v. *Rama Doss Patnaik* [6] and *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* [7] lay down the same principle.

As against this chain of authorities, the learned vakil relied upon some decisions of the Judicial Committee and on *Prasanna Kumar Mookerjee* v. *Srikantha Rout* [8] and on *Pathinharkara Vallabhan Chattan Rajah* v. *Rama Varma* [9]. The decision in *Bahadur Singh* v. *Mohar Singh* [10] that one reversioner does not claim through another has no bearing on the present case. Until the widow dies, it cannot be predicated of any one of them that he would be the heir, consequently, they may not be said to claim

1. (1875) 23 W. R, 253.
2. (1899) I. L. R. 23 M. 271=10 M. L. J. 29 (P. C.)
3. (1896) I. L. R. 23 C. 536 at 546.
4. (1899) 10 M. L. J. 114.
5. (1893) I. L. R. 16 M. 456.
6. (1904) I. L. R. 28 M. 197.
7. (1906) I. L. R. 29 M. 390 at 409.
8. (1912) I. L. R. 40 C. 173.
9. (1914) 28 M. L. J. 669.
10. (1901) I. L R. 24 A. 94.

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title through each other. Moreover, the position of a Sthani is not analogous to that of a reversioner. Nor does *Runchordas* v. *Parvatibai* [1] help the appellant. It was held in that case that a reversioner does not derive title through the widow in possession. The position of successive trustees is not the same as that of a widow and a reversioner. In *Prasanna Kumar Mookerjee* v. *Srikantha Rout* [2] the properties in the possession of the previous ghatwal were apparently resumed and regranted to the new ghatwal. See however *Radhabai aad Ramachandra Konher* v. *Anantrav Bhagvant Dehpande* [3]. Consequently, there can be no question of claiming through or from the previous owner. *Patinharkara Vallabham Chattan Raja* v. *Rama Varma* [4], to which I was a party related to a different state of affairs altogether. That was a case in which the right to the Sthanam itself was in dispute and not to any property or office which appertained to the Sthanam. It was argued in that case that a person who might at some future time succeed to one of the Sthanams should have sued for a declaration that a person in one of the higher Sthanams was a trespasser. I held that such a suit was not obligatory on the plaintiff, as he may never live to succeed to the Sthanam and that his cause of action arose only when succession opened to him. I followed *Veerayya* v. *Gangamma* [5] and other cases. It is open to argument whether those decisions are any longer law, having regard to the character which the Judicial Committee are now clothing a reversioner with. However that may be, my judgment in *Patinharkara Vallabhan Chattan Raja* v. *Rama Varma* [6] related to a different question and involved very difficult consideration from what are we now dealing with. On the other hand, the decision in *Damodar Das* v. *Lakhan Das* [6] seems to re-affirm the view taken by the Judicial Committee in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* [7].

I am, therefore, of opinion that limitation commenced to run against the plaintiff when the management was assumed by the defendants as against the previous Rajahs who were trustees of the Devaswom, and that consequently, the suit is barred by limitation.

1. (1899) I. L. R. 23 B. 725.
2. (1912) I. L. R. 40 C. 173.
3. (1885) I. L. R. 9 B. 198.
4. (1914) 28 M. L. J. 669.
5. (1912) I. L. R. 36 M. 570.
6. (1910) I. L. R. 37 C. 885.
7. (1899) I. L. R. 23 M. 271=10 M.L.J. 29.

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For the same reason, I think the defendants acquired a title by prescription to the office.

In the view I have taken, it is not necessary to consider the question raised by Mr. Ananthakrishna Aiyar that the right to sue having been barred under the Limitation Act of 1859 was not revived by the Act of 1871 or 1877.

The decision of the Subordinate Judge is right and this appeal must be dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE NAPIER.

Sathula Venkanna ... *Appellant* (1st Defendant.)*

v.

Namuduri Venkatakrishnayya and another ... *(Respondents Plaintiff and 2nd Defendant).*

Sathula Venkanna v. Namuduri Venkatakrishnayya.

Limitation Act, Art. 113—*Specific performance—Suit for, by third party to contract claiming as beneficiary thereunder—Contract to be performed on a contingency—Limitation—Starting point—Limitation Act—Beneficial construction*

A. entered into a contract with B. whereby it was agreed that as soon as B. paid a certain specified sum to A. the latter was to assign a decree in his favour to C. In a suit by C. against A for specific performance of the contract by the execution of an assignment deed, *held* that the second part of art. 113 of the Limitation Act applied to the case and limitation began to run from the date on which A. refused to perform the contract and not from the date on which B. made the payment stipulated by the contract.

Quaere: Whether the second part of art. 113 and not the first, would apply even if the suit had been instituted by B ?

The Limitation Act being an enactment which operates as a bar to a claim which is legally enforceable, should be construed as much as possible in favour of the person whose right is sought to be barred.

Second appeal against the decree of the Subordinate Judge of Cocanada in A. S. No. 82 of 1914, preferred against the decree of the Court of the District Munsif of Cocanada in O. S. No. 714 of 1912.

G. Venkataramiah for the Government Pleader *(V. Ramesam)* for Appellants.

M. Patanjali Sastri for *P. Narayanamurthi* for Respondents.

The Court delivered the following

Judgment :—This appeal arises out of a suit instituted by the plaintiff to compel the 1st defendant to execute a duly registered

* S. A. No. 842 of 1915. 6th February, 1917.

Sathula Venkanna v. Namuduri Venkata-krishnayya.

transfer in respect of a decree in a suit, O. S. No. 364 of 1904. The 1st defendant was the holder of this decree and he had by an agreement, Exhibit F, made with one Jayanti Venkayya (the second defendant) agreed that on Jayanti Venkayya paying to him the amount of that decree, he would transfer the decree to the plaintiff. The particular clauses of that agreement which are important are to the following effect: (1) The amount was to be paid within 6 months; (2) The transfer in favour of the present plaintiff was to be made as soon as the amount in respect of this Razinamah was paid. It is to enforce this latter clause that this suit is brought. No point has been taken that it was not open to the plaintiff, not a party to the contract, to bring a suit for specific performance; so we must deal with it as if that right did vest in him. The Lower Appellate Court has held that the suit is primarily barred under Art. 113 of the Limitation Act, but that the circumstances under which the 1st defendant received the money from the 2nd defendant constituted him a trustee for the plaintiff within the meaning of S. 10 of the Limitation Act, and it therefore held that the suit was not barred. Before us this contention was not relied on by the respondent and we think rightly, for it would be quite impossible to bring this case within the language of that section. But it has been urged by the respondent that the contract does not contain the date fixed for the performance and that the second clause "when the plaintiff has notice that performance is refused" is the starting point for limitation and that therefore the suit is not barred. For the appellants it is contended that the date is fixed for the performance and the suit is out of time. Admittedly of course no specific date was fixed; and the question that remains is whether it is possible in these circumstances to apply the doctrine *certum est quod certum reddi potest;* so as to bring the case within the article. A very careful argument has been addressed to us by both sides. We have been strongly pressed with the decisions of the Privy Council in *Juggomohun Ghose* v. *Manick Chund* [1], and of the Court of Queen's Bench in *Merchant Shipping Co.* v. *Armitage* [2], and *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* [3]. These decisions turned on the construction of the Interest Act which is as follows, "that upon all debts or sums certain payable at a

1. (1859) 7 M. I. A. 263. 2. (1873) L. R. 9 Q. B. 99.
3. (1893) L. R. A. C. 429.

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certain time the jury on the trial of any issue may allow interest." There is no doubt that the Privy Council in dealing with this clause have given a very restricted meaning to it, and their Lordships give their reasons for so deciding at great length. They point out that the sum may never be due and that even if due it is uncertain in amount at the time of the contract and it necessarily follows of course that the amount which will be payable for interest will be equally uncertain. They also point out that this provision is an alteration of the common law and is in its nature penal and for these reasons, they construed the Act strictly.

The case in *Merchant Shipping Co.* v. *Armitage* [1], was argued before the Exchequer Chamber and the decision that there was no principal sum payable at a time certain on which interest could run was given by the court after the decision on the main question in respect of which the case is really reported. No reasons are given by the learned Judges for that decision. It appears that about the same time the opposite view was taken by the Court of Queen's Bench in a case reported in *Duncombe* v. *Brighton Club and Norfolk Hotel Co.*, [2]. Their Lordships did not consider the policy of the Act but confined themselves to applying the doctrine of "*certum est*" in its entirety. They quote and follow the language of Lord Kenyon in an old case which language is reproduced as being a correct exposition of the doctrine in Broom's Legal Maxims, vide page 479. That language certainly is in the widest terms, for it applies the maxim whether the time can be ascertained by any process of computation at the time the contract is made or whether it cannot. I will quote a few words: "That certainly need not be ascertained at the time; for if, in the fluxion of time, a day will arrive which will make it certain, that is sufficient. As, if a lease be granted for 21 years, after three lives in being, though it is uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty, and *id certum est quod certum reddi potest.*" We have therefore a clear conflict on the language of the Interest Act.

Now we have not to decide this question on the construction of that Act, and we must bear in mind the essential difference between the Interest Act and the Limitation Act. As pointed out in the Privy Council case the Interest Act is penal and

1. (1873) L. R. 9 Q. B. 99. 2. (1875) L.R. 10 Q.B. 371.

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imposes a higher liability than was known to common law. It should therefore be construed strictly. On the other hand, the Limitation Act is one which operates as a bar to a claim which is legally enforceable, and it should therefore be construed as much as possible in favour of the person whose right is sought to be barred. There are indications that the courts of this country have been inclined to give a liberal application to this language in Article 113. The case in *Muhi-ud-din Ahmad Khan* v. *Majlis Rai* [1], is one case. The decision of Mr. Justice Boddam in *Pindiprolu Sooraparaju* v. *Pindiprolu Veerabhadrudu* [2], is another. We do not think it necessary, however, to express a final opinion on this point because in this case there is here an element which seems to us to render the doctrine inapplicable. It may be that it is right to apply the doctrine fully between the actual parties to the contract who would get the benefit and be subject to the liabilities under the contract and to whom therefore the payment of the money would become a certain date some time or other to their knowledge. But in cases where a person is entitled to bring a suit on the contract who may not and need not, and very likely may not be aware of the date becoming fixed, we cannot think that the doctrine will apply. Taking this case for instance the second defendant was bound to pay the amount within six months to the 1st defendant, and on the date of that payment the 1st defendant was bound to transfer the property to the plaintiff. He might have paid it, within two days; and the plaintiff need not have known anything about it. He might have paid it, as in fact he did, three days after the due date and the plaintiff might not have known anything about it. He might not have paid it till years after the due date and the 1st defendant might have accepted payment and the plaintiff might not have known anything about it. It seems to us therefore that in cases where a right to enforce specific performance vests in a third party to whom the ascertainment of the date need not necessarily be known, the doctrine *certum est quod certum reddi potest* can have no application. We therefore on this narrow ground alone, hold that the suit is not barred by reason of the first part of Article 113 and that as he is within time under the second part of the Article, the claim is not barred. It is admitted that there is no defence on the merits. The appeal will therefore be dismissed with costs.

A. V. V.

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1. (1884) I.L.R. 6 A., 231. 2 (1907) I.L.R. 30 M., 486=17 M.L.J. 505.

PRIVY COUNCIL.

PRESENT :—VISCOUNT HALDANE, LORD ATKINSON, SIR JOHN EDGE AND MR. AMEER ALI.

Lachman Prasad ... *Plaintiff-Appellant.**

v.

Sarnam Singh and others ... *Defendants-Respondents.*

P. C.

Lachman Prasad *v.* Sarnam Singh.

Hindu Law—Mitakshara—Mortgage by head of joint family—Whether property can be made available to the extent of mortgagor's interest—Equity arising out of representation of authority.

Where the property of a Hindu joint family is mortgaged by one of the members (save and except by the head of the family for antecedent debt or proven necessity of the joint family) the general law is that the mortgage is not valid at all, even to the extent of the mortgagor's interest.

It is possible that exceptions to this general rule may arise from special circumstances, *e. g.*, from a representation or undertaking by the mortgagor that he had power to mortgage the joint property, but no special circumstances were held to exist here.

Mahabeer Persad v. *Ramyad Singh*[1] discussed.

Appeal from a decree of the Allahabad High Court, dated December 11, 1912, affirming a decree of the Subordinate Judge of Bareilly.

The facts of the case are sufficiently set out in their Lordships' judgment. Three members of a joint family (the first three defendants) mortgaged the joint property to plaintiff, who sued. The Subordinate Judge, on the authority of *Chandradeo Singh* v. *Mata Prasad* [2] held that the mortgage was invalid and dismissed the suit: and his decision was confirmed on appeal by the High Court.

Hence this appeal.

J. M. Parikh and *J. K. Roy* for Appellant.

Respondents did not appear at the hearing.

Parikh for Appellant :—The recent judgment of the Board in *Sahu Ram Chandra* v. *Bhup Singh* [3], precludes me from questioning the principle of *Chandradeo Singh* v. *Mata Prasad* [2], but I submit that relief can be granted in equity against the mortgagor's share : *Mahabeer Prasad* v. *Ramyad Singh* [1].

* 26th April, 1917.

1. (1873) 12 Beng. L. R. 90. 2 (1909) I.L.R. 31 A. 176 (F. B.)
3 (1917) 33 M.L.J. 14.

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[*Viscount Haldane* :—That case was decided on the ground that the father and the eldest son had in effect made a misrepresentation which they had to make good. Here there are no such special circumstances as to create an estoppel.]

The case is discussed by this Board in *Madho Prashad* v. *Mahabeer Singh* [1], where it was said that the Judges deciding it justly considered that it was contrary to equity and good conscience that the mortgagors should keep the security and the money. As to representation, there is just as much evidence of it here as there was there.

[*Viscount Haldane* :—I am not at all sure the Board gave the weight of their authority to that Bengal case.]

The mortgage here is voidable only, not void if the other side had not opposed. Plaintiff would have got a decree.

Their Lordships' judgment was delivered by

Viscount Haldane.

Viscount Haldane :—In this case no difficult question of law arises, and their Lordships are prepared to intimate at once the advice which they will tender to His Majesty upon the appeal.

It is a suit with regard to a mortgage made on the 21st September, 1885, by three Hindus subject to the Mitakshara law, who joined in borrowing 1,200 rupees on the security of the property of the joint family of which they were the heads. There is nothing special in the terms of the mortgage, which do not go beyond what is stated. It is contended that although, according to the decisions of this Board, that mortgage is *prima facie* invalid, as being for neither an antecedent debt nor for any proven necessity of the joint family, it still may be held to be valid on the doctrine laid down by the High Court of Calcutta in the case of *Mahabeer Persad* v. *Ramyad Singh* [2]. There, the head of a joint family and his son, who was of age, united in attempting to raise money. There was a younger son, also a member of the joint family, who was not of age and who did not, and could not, concur. The mortgage was declared bad, but the learned Judges who decided the case thought themselves at liberty to put a condition into the decree which in effect determined that an implied representation or undertaking given by the mortgagors that they had power to charge the joint family property, and would make good the representation by partition or otherwise, should receive effect,

1. (1890) L.R. 17 I.A. 194, 196, 198. 2. (1873) 12 Beng. L. R. 90.

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and accordingly they, in substance, ordered by their decree a partition of the property so that the separate shares to be obtained under the partition of the father and the son should be made payable to the mortgagees. Whether that particular case was rightly decided or not, it is not necessary to consider here, because the learned Judges proceeded upon the footing that there had been the representation referred to. On looking at the facts, their Lordships agree with the observation of Mr. Parikh that there was very little, if any, evidence of such representation, but that there was such a representation was the basis of the judgment, and, unless the learned Judges had held that an equity arose out of it, their judgment would have amounted to this, that for every mortgage by the head of a joint family the property of the joint family could be made available to the extent of the interest of the mortgagor. Now, whatever may happen where there are special circumstances such as there were in the case referred to, that is not the general law. The general law is quite plainly laid down by Lord Watson in delivering the judgment of this Board in the case of *Madho Parshad* v. *Mahabeer Singh* [1], where he says, at p. 196, this:—

"Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process. So long as his interest is indefinite, he is not in a position to dispose of it at his own hand and for his own purposes; but as soon as partition is made, he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property. The actual partition is not in all cases essential. An agreement by members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of a member's interest in the estate or a sale under the execution."

Now these are the principles which govern this and all other cases of the kind, and according to these principles, there can be no doubt that the present mortgage is void. There were no such special circumstances as the learned Judges seem to find in the first case above quoted entitling them to impose terms upon the plaintiffs, and, whether Lord Watson approved that case or not, which is not quite clear, he at all events said that it had no application which would affect the operation of the principles which he laid down as above quoted.

The result is that the mortgage in the present case is bad and the appeal fails, and their Lordships will humbly advise His

1. (1890) L. R. 17 I. A. 194.

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Majesty that it should be dismissed with such costs as the respondents, not having appeared before this Board, may be entitled to.

Solicitor for Appellant:—*E. Dalgado.*

Solicitors for Respondents:—*Pyke, Franklin and Gould.*

A. P. P.

PRIVY COUNCIL.

PRESENT:—VISCOUNT HALDANE, LORD ATKINSON, SIR JOHN EDGE, MR. AMEER ALI AND SIR WALTER PHILLIMORE.

Kawal Nain and others ... *Plaintiffs-Appellants**

v.

Budh Singh and others ... *Defendants-Respondents.*

P. C.

Kawal Nain v. Budh Singh.

Hindu Law—Mitakshara—Joint family—Partition—Suit for partition dismissed though right to partition admitted—Whether status remains joint or several.

A member of a Hindu joint family instituted a suit for partition. The suit was dismissed on the ground that though he had a legal right to partition, he had in the Judge's opinion no proper motive for exercising that right. Thereafter he mortgaged his share, and on the mortgagee suing, claimed to be still joint.

Held, that notwithstanding the judgment, the mortgagor had become separate from the date of his suit and that the mortgage of his share was valid.

Appeal from a decree of the Allahabad High Court, dated April 10, 1913, reversing a decree of the Subordinate Judge of Saharanpur.

The facts of the case are sufficiently set out in their Lordships' judgment. It may be added that the suit for partition filed by Prabhu Lal was not only instituted but dismissed before the mortgage, which was in fact intended to provide funds for an appeal. Such appeal was not however proceeded with, a compromise being effected, under which Prabhu Lal did in fact become separate. When a suit was brought on the mortgage, he and the other members of the family, who were joined "as a precautionary measure" set up that they were joint and the mortgage invalid. The Subordinate Judge decreed the suit, but the High Court (Richards, C. J. and Banerji, J.) dismissed it on the ground that at the date of the dismissal of the suit for partition the mortgagor was joint.

Hence this appeal.

* 17th April, 1917.

P. C.

Kawal Nain v. Budh Singh.

De Gruyther, K. C. and *Dube* for Appellants :—The only question is whether the mortgagor was joint or separate when he executed the mortgage. I contend that from the date of instituting his suit for partition he was separate :—*Girja Bai* v. *Sadashiv Dhundiraj.*[1] which was decided subsequent to the High Court judgment under appeal. It is immaterial that by an erroneous judgment the suit for partition was dismissed: the filing of that suit was an unequivocal intimation of plaintiff's desire to separate, and he became separate from April 6, 1889. The Subordinate Judge in dismissing the suit said "It appears that the plaintiff is now thinking of wasting the family property, and having found no other means, he has instituted this suit without there being any actual cause of action. I must admit that the plaintiff has certainly a share in the joint ancestral property equal to that of his father, and he can also get the property partitioned under the Hindu Law; but this admission does not warrant the institution of a suit in Court without the accrual of any cause of action."

[*Sir Walter Phillimore* :—He has confused "cause of action" with motive.]

[*Viscount Haldane* :—The learned Judge may be wrong but he has delivered a judgment and you have to show that you are not bound by it. He has refused to give you partition].

The only refusal is refusal to divide by metes and bounds. The Sub Judge admitted that Prabhu had one-fifth share and could get the property partitioned under Hindu Law. He does not say that Prabhu did not unequivocally express his intention to separate. I submit that his filing the suit was such an unequivocal intimation. The High Court went wrong by regarding the question as being whether actual physical partition had taken place. They had not this Board's judgment before them.

[*Sir W. Phillimore* :—They do not seem to have applied their minds to the question whether separation can be effected by volition.]

The respondents were unrepresented.

Their Lordships' judgment was delivered (April 24, 1917) by

Viscount Haldane.

Viscount Haldane :—This is an appeal from a judgment of the High Court at Allahabad which reversed a judgment of the Subordinate Judge of Saharanpur. The question which arose was whether a mortgage of certain interests in land was valid, as contended by the appellants, who were the successors in title of the

1. (1916) L. R. 43 I. A. 151=31 M. L. J. 455.

P. C.

Kawal Nain v. Budh Singh.

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original mortgagee. The land had been the property of a joint family subject to Mitakshara Law, and the controversy turned on whether the respondent Prabhu Lal, the mortgagor, had separated from the joint family before executing the deed, and so rendered himself competent to make a valid hypothecation of the interest which had come to him as a member of the joint family.

Prior to the mortgage, which was dated the 28th August, 1890, the respondent, Prabhu Lal had, on the 6th April, 1889, commenced a suit for partition. By his plaint he had claimed a fifth share of the family property, and their Lordships entertain no doubt that the claim amounted to an intimation to the defendants, his co-sharers of the unequivocal desire of the plaintiff for separation from the joint family. If this be so the judgment of the Judicial Committee in the recent case of *Girija Bai* v. *Sadashiv Dhundiraj*[1] renders it beyond question that the commencement of this suit for partition effected a separation from the joint family. It is immaterial, in such a case, whether the co-sharers assent. A decree may be necessary for working out the result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not.

These considerations are sufficient to dispose of the only serious question raised by the present appeal. Had their Lordships' judgment in the case just referred to been delivered before and not after the judgments now under review, that of the High Court would probably have been different. The Subordinate Judge thought himself bound to examine a number of transactions from which he drew the inference that the members of the joint family had assented to the severance contended for, although a complete partition had not been carried out. It was not necessary for him to find so much in order to establish the severance, but the result at which he arrived was right. The High Court, in reversing his decision, proceeded on the footing that no agreement for severance had been established, and that it was necessary that the existence of such an agreement should be shown. This is plainly contrary to the principle as subsequently laid down by this Board in the other case. It has been argued that the suit for partition, commenced by the plaint of 1890, was dismissed and

1. (1916) L.R. 43 I.A. 151=31 M. L. J. 455.

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Viscount Haldane.

that the plaint was therefore of no effect. Their Lordships cannot assent to this argument. It is true that in the suit of 1890 the Subordinate Judge dismissed the claim disbelieving the case put forward in support of it, namely, that the father, who was head of the joint family, had refused to supply his son Prabhu Lal with the funds required to maintain him, and had otherwise illtreated him. The High Court says that, while this disbelief was no valid ground for dismissing a claim for partition, it still shows that on the date when the suit was dismissed the family remained joint. It will, however, be observed that the judgment in that suit proceeded on the ground that owing to the age of the father he might have other children and that in consequence the property could not be divided or the plaintiff's share fixed. But, while this was obviously wrong, the judgment on its face concedes that the plaintiff had a right to partition, although no cause of action for an actual partition was regarded as having accrued. It cannot be said that the plaint did not amount to such an expression of intention as to satisfy the conditions of the law as now settled.

Their Lordships have thought it necessary to examine the argument for the appellants in the present appeal with the more care because the respondents have not been represented at the Bar. But they are satisfied that the High Court has given a decision which cannot stand. They will therefore humbly advise His Majesty that this appeal should be allowed and the decree of the Subordinate Judge restored. The respondents must pay the costs here and below. But their Lordships desire to point out that as the personal remedy under the mortgage is probably barred by limitation, the liberty to apply for a personal decree, which is given by the decree in accordance with Order 34 of the Code of Civil Procedure and S. 90 of the Transfer of Property Act in the event of the proceeds of a sale proving insufficient, must be subject to the right of the respondents to raise any such defence to the personal claim, such as one based on limitation, which may prove open to them.

Solicitors for Appellants :—*Barrow Rogers and Nevill.*

Solicitor for Respondents :—*Douglas Grant.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SESHAGIRI AIYAR.

Doraisami Padayachi and another ... *Appellants** (*Plaintiffs*)

v.

Vaidyalinga Padayachi (dead) and others ... *Respondents* (*Defendants*).

Doraisami Padayachi v. Vaidyalinga Padayachi.

Specific Relief Act (*I of* 1877), *S.* 21—*Enactment of Civil Procedure Code* (*V of* 1908), *Sch.* II, *para* 22, *during pendency of reference to arbitration—Rights of parties unaffected—Bar of suit—Termination of arbitration proceedings by death of arbitrators—Suit for dissolution of partnership and accounts—Limitation—Time, if runs, during pendency of arbitration—Limitation Act* (*IX of* 1908), *article* 120, *applicability of.*

Certain disputes between the plaintiffs and defendants as regards the taking of accounts of a partnership said to have been dissolved in 1905, were referred to arbitration on 8-3-1906. The arbitration proceedings came to an end on 31-10-1910 by the death of the arbitrator. In a suit instituted by the plaintiffs in 1911 for dissolution and accounts, the defendants raised the plea that it was barred by limitation, *held*, that the suit was not barred.

The effect of S. 21 of the Specific Relief Act, while it was in force, was to confer on the other parties to the contract, a right to have their disputes decided by arbitration and not by suit and this was a substantive right which when once it accrued, would not be affected by the enactment of S. 22 of Schedule II of the Civil Procedure Code, 1908.

Further, the special provision in S. 21 of the Specific Relief Act, while it was in force, prevented time running against the plaintiffs under the Limitation Act and whether the effect of this provision was merely to suspend the running of time or to take the case out of the specific article and bring it under article 120, in either case, the suit was within time.

The institution of a suit after a contract to refer to arbitration is a sufficient refusal to perform such contract so as to bar the suit under the section.

Ramkumar Singh v. *Jagmohan Singh* [1], referred to.

Per Seshagiri Aiyer, J: The residuary article 120 applied to the case and the cause of action for the suit having arisen on the death of the arbitrator in 1910, the suit was within time.

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonum in A. S. No. 491 of 1913 preferred against the decree of the District Munsif of Shiyali in O. S. No. 15 of 1912.

The facts, material to this report, are briefly these: Plaintiffs and defendants were partners and the partnership was alleged to have come to an end in 1905. Disputes having arisen between the parties, the matter was referred to arbitration on 8-3-1906. Nothing was done by the arbitrator for a long time and eventually

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* S. A. No. 1965 of 1914. 23rd February, 1917.

1. (1910) I. L. R. 33 A. 815.

Doraisami Padayachi v. Vaidyalinga Padayachi.

the arbitration proceedings came to an end by the death of the arbitrator on 31-10-1910. In 1911 the plaintiffs brought the present suit for dissolution of partnership. The plea of the defendants was that the suit was time-barred and both the Courts below upheld the plea and dismissed the suit. Plaintiffs preferred a second appeal. The reference to the Full Bench and the answer thereto are reported in (1916) I. L. R. 40 M. 31=32 M. L. J. 422.

R. Kuppusami Aiyar for the Appellant.

S. Muthiah Mudaliar for the Respondent.

The Court delivered the following

The Chief Justice.

Judgment:—*The Chief Justice*:—The answer to the Full Bench reference being against him, Mr. Kuppusami Aiyar for the appellant has relied on another of the grounds taken here and in the lower Appellate Court, that time did not run between the 8th March, 1906 the date of the reference to arbitration and 31st October 1910, when it is alleged the arbitration proceedings came to an end by the death of the arbitrator. S. 21 of the Specific Relief Act provided that " if any person who has made such a contract (to refer to arbitration) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such a contract shall bar the suit." As to this I agree with Richards, J., one of the referring Judges in *Ram Kumar Singh* v. *Jagmohan Singh* [1], that the institution of a suit after the contract to refer is sufficient refusal to perform such a contract to bar the suit under the section. The result of this provision when it was in force was, it seems to me, to bar the plaintiff's right to sue for dissolution of partnership so long as the arbitration had not broken down or the other side had not refused to go on with it. If the arbitration had become impossible as by the death of the arbitrator or the other side had refused to go on with it, S. 21 would have ceased to operate as a bar to the plaintiff. The question then is, what is the effect to be attributed to the removal of this statutory bar by the repeal of this provision of S. 21 by S. 22 of the second schedule of the Code of Civil Procedure of 1908. The effect of the provision while it was in force, was to confer upon the other parties to the contract a right to have the question decided by arbitration and not by suit, and this was a substantive right of an important character. This being so, the repeal of this provision

1. (1910) I. L. R. 33 A. 315.

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The Chief Justice.

of S. 21 by the Civil Procedure Code of 1908 did not affect the right of the other parties to the contract which had accrued under it (General Clauses Act 1897, Section 6 (c),) and consequently if the plaintiff had brought the present suit immediately on the coming into force of the Code he would still have been liable to be met by a plea founded on the repealed provision, and it was only when by the death of the arbitrator in 1910 further proceedings in the arbitration became impossible that the plaintiff's right to sue was restored to him. It is I think clear that the special provision in S. 21 prevented time running against the plaintiffs under the Limitation Act while it was in force and whether the effect of this provision was merely to suspend the running of time under the Limitation Act, or to take the case out of the Article and bring it under Art. 120, in either case, the suit would be within time. I may say however that I do not think that the Judicial Committee should be considered in *Nrityamoni Dassi* v. *Lakhan Chandra Sen* [1], to have departed from the view clearly expressed in *Lala Soni Ram* v. *Kanhaiya Lal* [2]. We allow the appeal, reverse the decrees of the Lower Court and remand the case for disposal according to law. Costs incurred hitherto to abide.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J. :—The points raised by Mr. Kuppusami Aiyar on this second occasion are by no means easy of solution. Upon one point my mind is clear. The parties referred the matters in dispute to arbitration before the new Code of Civil Procedure came into force. At that time the rights of the parties were regulated by S. 21 of the Specific Relief Act. That section says that the existence of a contract to refer "shall bar the suit." Mr. Muthiah Mudaliar's ingenious argument that the bar affects only the agreement to refer and not a pending reference is obviously untenable. As I read the section, a right is conferred on one of the parties to a contract to prevent the other from enforcing his rights other than through the tribunal chosen by the parties. Such a right cannot be said to be a mere incident of processual law. It is well-established that a right of appeal granted under a repealed Act is not affected by the new Act. *Colonial Sugar Refining Co.* v. *Irving* [3], *Sadasiva Pillai* v. *Kalappa Mudaliar* [4], and *Nana* v.

1. (1916) I. L. R. 43 C. 660=30 M. L. J. 529.
2. (1913) L. R. 40 I. A. 74=25 M. L. J. 131.
3. (1905) A. C. 369.
4. (1900) I. L. R. 24 M. 39.

Sheku [1]. A vested right is not ordinarily taken away by a new Act. *Gopeshwar Pal* v. *Jiban Chandra Chandra* [2]. Applying these principles, it seems to me that S. 22 of the Second Schedule to the new Code of Civil Procedure did not deprive the defendant of the right which he had of objecting to the suit, the matter in dispute having been referred to arbitration. It follows from this that so long as the arbitration was operative, the plaintiff was incapable of enforcing his rights in a Court of Law.

It is admitted that the proceedings were pending until October 1910 when the arbitrator died. In my opinion, the plaintiff was debarred from seeking the assistance of the Court till then. It was next argued that a bare institution of a suit would not amount to "a refusal to perform" so as to attract the provisions of S. 21 of the Specific Relief Act; and that as the plaintiff had always expressed his willingness to abide by the decision of the arbitrator, the defendant never had any right to plead the bar of S. 21. In *Ram Kumar Singh* v. *Jagmohan Singh* [3]. Mr. Justice Richards (as he then was) held in the judgment from which a Letters Patent Appeal was preferred, that the filing of a suit would amount to refusal to perform, and Mr. Justice Tudball who differed from him expressed no opinion on this question. The learned Judges who heard the Letters Patent Appeal did not question this dictum of Mr. Justice Richards. In my opinion the institution of a suit by the plaintiff would be an overt act indicative of an intention not to perform the contract entered into by him

The head note to the decision in *Tahal* v. *Bisheshar* [4], is somewhat too broadly expressed. The learned Judges based their decision upon the view "that the contract, the existence of which would bar a suit under the circumstances contemplated by this section, must be an operative contract and not a contract broken up by the conduct of all the parties to it." If there was no enforcible contract, the question of refusal to perform could not have arisen. *W. Crisp* v. *Adlard* [5], relied on by the learned vakil for the respondent has no application to the present case. I am therefore of opinion that if the plaintiff had brought a suit before the arbitrator died, he could have been prevented from enforcing his rights in the suit by virtue of the last clause of S. 21 of the Specific Relief Act.

1. (1908) I. L. R. 32 B. 337.
2. (1914) I. L. R. 41 C. 1125.
3. (1910) I. L.R. 33 A. 315.
4. (1885) I. L. R. 8 A. 57.
5. (1896) I. L. R. 23 C. 956.

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Seshagiri Aiyar, J.

The further point whether the period during which the bar operated should be regarded as having been merely suspended or whether the cause of action for the suit itself should be regarded as not having accrued until the death of the arbitrator is one on which there is room for considerable difference of opinion. The suspension of the period is provided for by Ss. 14 and 15 of the Limitation Act. I do not think that the present case is covered by either of these sections. Ordinarily that would be a sufficient answer. But the Judicial Committee have recently (*Nrityamoni Dassi* v. *Lakhan Chandra Sen* [1]) given their general adherence to the conclusion expressed in *Lakhan Chandra Sen* v. *Madhusudan Sen* [2]. That decision seems to lay down that apart from the statute, a party who is prevented from enforcing his claim has a general right that the period of his disability should not count against him, although the difficulties in his way may not be of the nature contemplated by Ss. 14 and 15 of the Limitation Act. An examination of the authorities relied on in *Lakhan Chandra Sen* v. *Madhusudan Sen* [2] does not support the general proposition laid down therein; but the question must be taken to have been set at rest by the Privy Council by their pronouncement in *Nrityamoni Dasi* v. *Lakhan Chandra Sen* [1]. Mr. Justice Ayling and myself recently followed *Lakhan Chandra Sen* v. *Madhusudan Sen* [2], in Appeal Against Order No. 354 of 1915. We have not then to consider whether there was only a suspension of the period and not of the cause of action itself, as in any event, the plaintiff would have been in time. There is an earlier decision of the Privy Council which seems to throw some doubt on this theory of the suspension of the cause of action. In *Lala Soni Ram* v. *Kanhaiya Lal* [3], it was argued that the period during which there was a fusion of the interests of the mortgagor and of the mortgagee should be extended in calculating the period allowed by Art. 148. Their Lordships expressed the opinion that S. 9 of the Limitation Act was against the plea. It is inferable from the judgment that the fusion created either an inability or disability to sue and that as S. 9 expressly enacted that time which had once commenced to run should not be stopped by such a subsequent inability or disability, the period of the fusion of the rights should not be excluded. It may be possible to distinguish *Nrityamoni*

1. (1916) I. L R. 43 C 630. 2. (1907) I. L. R. 35 C. 209.
3. (1913) L.R. 40 I. A. 74=25 M.L.J. 131.

Doraisami Padayachi v. Vaidyalinga Padayachi

Seshagiri Aiyar, J.

Dasi v. *Lakhan Chandra Sen* [1] from the earlier case on the ground that no question of inability or disability arose in the latter. But the extension of the principle contained in *Nrityamoni Dasi* v. *Lakhan Chandra Sen* [1], must be made with great caution. I think it would be more logical to hold that as a result of the interposition of the bar, Art. 91 is not applicable to the present case. In another case which was argued subsequently, I have stated my reasons for invoking the aid of the residuary articles whenever a specific article in all its bearings is not applicable. Acting on that view, I am prepared to say that the residuary Art. 120 applies to this case and that as the cause of action arose for the suit only on the death of the arbitrator in 1910—for as pointed out by the learned Chief Justice, under S. 6 (c) of the General Clauses Act the bar continued till then—the suit is within time.

The decree of the Court below must be reversed and the suit must be remanded for disposal on the merits. Costs to abide the result.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM, MR. JUSTICE SPENCER AND MR. JUSTICE SRINIVASA AIYANGAR.

Gangadara Mudali ... *Appellant** (*Defendant*).

v.

Sambasiva Mudali ... *Respondent* (*Plaintiff*).

Gangadara Mudali v. Sambasiva Mudali.

Registration Act, Ss. 72 and 77—Document presented within time improperly returned by registering officer—Fresh presentation after four months—Refusal to excuse delay—Refusal to accept document for registration—Appeal to District Registrar, if lies—Dismissal of appeal, if gives rise to a cause of action for a suit under S. 77.

A document was presented for compulsory registration on the last day allowed by law but was not received by the registering officer. Thereupon the document was presented on the next day with an application for excusing the delay. The latter application was rejected and the registering officer refused to accept the document for registration. An appeal to the District Registrar having been dismissed, the aggrieved person instituted a suit under S. 77 of the Registration Act. *Held* that the order of the registering officer was a refusal to register within the meaning of S. 72 of the Registration Act against which an appeal lay to the District Registrar and that the dismissal of the appeal by the latter gave rise to a cause of action for a suit under S. 77 of the Registration Act.

Gangava v. *Sayava* [2], disapproved; *Narasimha Nayanim Varu* v. *Ramalinga Rao* [3], *and Sivarama Pattar Kariakar* v. *Krishna Iyer* [4], referred to.

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* L. P. A. No. 120 of 1916. 1st November, 1916.

1. (1916) I.L.R. 43 C. 660.
2. (1896) I. L. R. 21 B. 699.
3. (1899) 10 M. L. J. 104.
4. (1914) 26 M. L. J. 307

Gangadara Mudali v. Sambasiva Mudali.

Appeal under Clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Seshagiri Aiyar in S. A. No. 2348 of 1914 preferred against the decree of the Court of the Temporary Subordinate Judge of Tanjore in A. S. No. 113 of 1914 (O. S. No. 71 of 1913 on the file of the Court of the District Munsif of Tiruturaipundi).

The facts are set forth in the judgment of Seshagiri Iyer, J.

The Court delivered the following

Seshagiri Aiyar, J.

Judgments:—*Seshagiri Aiyar, J.*:—The facts are not in dispute in this case. The defendant executed a sale-deed to the plaintiff on the 3rd September, 1912. Owing to the non-payment of the consideration in full, the defendant refused to get the document registered. The plaintiff presented it to the Sub-Registrar for compulsory registration on the 3rd of January 1913. On that day according to the evidence of the Sub-Registrar, he was so busy that he was not able to find time to receive the document and to issue summons to the defendant. The Sub-Registrar therefore suggested that the document should be presented the next day with an application for excusing the delay in not having presented it earlier. This was done. The application for excusing the delay was lodged with the Sub-Registrar under S. 25, Cl. 2 of the Registration Act to be forwarded to the Registrar. The Registrar did not excuse the delay. His order has not been put on the record. The Sub-Registrar passed final orders on the 14th January 1913 in these words:—"Inasmuch as no permission has been given for accepting the said document for registration under S. 25 of the Registration Act, in Current Memo No. 79, General, dated the 11th January, current year, issued by the Registrar, the registration of this document is refused under sub-S. 5 of S. 24 of the Registration rules." (Exhibit E). Thereupon an appeal was preferred to the Registrar. This was dismissed on 1st February 1913. The present plaint was presented under S. 77 of the Registration Act on the 3rd of March 1913. It was conceded before us that the suit was within thirty days of the order of the Registrar. The Subordinate Judge differing from the District Munsif gave a decree to the plaintiff.

In this second appeal as the respondent was not represented, we requested Mr. Ramabhadra Aiyar to assist as *amicus curiae*. We are indebted to him for his clear and able argument. The appellant's case was presented to us with equal ability and clearness by Mr. Visvanatha Sastri.

The main contention for the appellant was that this suit is not in the purview of S. 77 of the Registration Act. Mr. Visvanatha Sastri argued that the order of the Sub-Registrar communicating the opinion of the Registrar that the delay in presentation will not

Gangadara Mudali v. Sambasiva Mudali.

Seshagiri Aiyar, J.

be excused is not an order, "*refusing to admit a document to registration*," as contemplated by S. 72, Cl. (1) of the Act and that no appeal lay to the Registrar against that communication. Therefore the appeal to the Registrar and the order thereon (Exhibit F) were both incompetent and furnished no ground for a suit under S. 77. Before dealing with the few cases cited in argument, I shall examine the sections. It is true that under Section 25, the power to excuse the delay in presentation is vested solely in the Registrar. What the Sub-Registrar has to do is simply to send up the papers to the Registrar. The party is still before the Sub-Registrar; the final word has to be said by him although he is bound by the opinion of his superior. The next question is, did the Sub-Registrar "refuse to admit the document to registration"? The fact that he has no option in the matter does not affect the solution of the question. In his order Exhibit E he says that "the registration of this document is refused". Of course, if he had no power to pass the order, the words used by him will not avail the plaintiff. In my opinion, he has the power to pass an order whether he would register the document or not and that order would be strictly within his rights. The Registration Act uses two or three expressions which have caused some confusion of thought. *Refusal to registar, Refusal to accept for registration, Refusal to admit for registration* are used in the body of the Act without indicating the difference in the meaning to be attributed to these expressions. In my view, the order of the Sub-Registrar is a "refusal to admit the document to registration"—and as such is appealable. Mr Visvanatha Sastri pointed out an anomaly which this interpretation would involve. By the appeal to the Registrar in such cases that officer is asked to review his own opinion given on the ex parte representation of the Registrar. There is force in this argument. The only answer is that on the previous occasion when he passed orders on the papers sent to him by the Sub-Registrar, the Registrar was acting in his advisory capacity. My attention has not been drawn to any provision which enables a party who has lodged his application for excusing the delay before the Sub-Registrar to be heard in support of his application. But when he hears an appeal, he was performing a judicial act and the parties have a right of audience. It may be that the legislature intended that he should reconsider his decision for good cause shown. However that may be, I am unable to say that the order of the Sub-Registrar is not one refusing to admit the document to registration. An argument was founded on the use of a similar expression in S. 58, and it was said that admitting to registration is a technical language which contemplates some preliminary steps. I am not convinced by this argument. . . . .

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Seshagiri Aiyar, J.

There is one other aspect of the question. S. 76, cl. (1) (b) contemplates an original application to the Registrar to direct the registration of a document by a Sub-Registrar. No doubt such an application *may be* lodged with the Sub-Registrar for its being forwarded to the Registrar. But the language is not mandatory. Under cl. 1 of S. 25 it is competent to the Registrar, if the delay does not exceed 4 months to excuse it on certain conditions and direct the registration of the document. There is nothing in the Act to prevent a party from applying to the Registrar to excuse the delay. S. 76 Cl. 1 (b) implies that such a direct application is competent. If this is correct, the appeal preferred by the plaintiff against the order of the Sub-Registrar may be regarded as an original application to the registrar to excuse the delay. The fact that he expressed an unfavourable opinion when the papers were forwarded to him would not prevent his entertaining an original application. His dismissal of the appeal would be in effect refusing to direct the Sub-Registrar to register the documents. Such a refusal would furnish a cause of action for a suit under S. 77.

I have thus far avoided discussing the case law on the point. The decision strongly relied upon is that reported in *Gangava* v. *Sayava* [1]. In this case immediately on the receipt of the order refusing to excuse the delay, the suit under S. 77 was filed. With all respect I am unable to concur in the view that the refusal to excuse the delay is not a refusal to register. I am fortified in my opinion by the view taken in Madras in *Narashima Nayanivaru* v. *Ramalinga Rao* [2], and *Sivarama Pattar Kariakar* v. *Krishna Aiyar* [3], which seem to disapprove of the Bombay decision. The decision in *Kanhayalal* v. *Sardar Singh* [4], is in conflict with the Bombay decision although it is not referred to in the judgment. The reasoning in *Kudrathi Begum* v. *Najibunnissa* [5], is also in favour of the view I have taken. *Udit Upadhia* v. *Imam Bandi Bibi* [6], does not really touch this case.

For the reasons above given, I am of opinion, that the suit was properly laid under S. 77 of the Registration Act.

I would therefore dismiss the second appeal.

Bakewell, J.

Bakewell, J. :—For the purposes of this appeal it is necessary to examine the procedure prescribed by the Indian Registration Act, 1908, for the registration of documents. A party claiming under a document must present it at the proper registration office (S. 32) and in certain cases the registering officer is forbidden to accept it for registration (See Ss. 20 (1), 21 (1), (4), 23, 71 (2)). Ss. 34 and 35 and part 7 prescribe the procedure to be followed upon the inquiry

1. (1896) I. L. R. 21 B. 699.
2. (1899) 10 M. L. J. 104.
3. (1914) 26 M. L. J. 307.
4. (1907) I. L. R. 29 A. 284.
5. (1897) I. L. R. 25 C. 93.
6. (1902) I. L. R. 24 A. 402.

held by the registering officer when he has accepted a document for registration and part XI (B) deals with the procedure after this inquiry when he has decided to admit it to registration.

There are therefore three principal stages in the registration of a document, first its acceptance by the officer, secondly his enquiry as to its admissibility to the register and thirdly his placing it upon the register.

The Act is silent as to the effect of a refusal by the officer to accept a document for registration except where the time limited for presentation has expired, in which case the principal registering officer has a discretion to enlarge the time (S. 25), but possibly the Registrar might act under S 68.(2).

S. 73 provides for an application to the Registrar where in the inquiry before a Sub-Registrar a party has denied execution, and S. 72 provides an appeal to the Registrar where a Sub-Registrar has in other cases refused to admit a document to registration. S. 75 deals with the order of the Registrar in an inquiry by him as to the execution of a document by a party.

S. 76 prescribes the procedure to be followed by the Registrar when he refuses to register a document or to direct its registration under Ss. 72 or 75. S. 77 provides a remedy by suit in a Civil Court in cases where the Registrar has refused to order a document to be registered under either of the last mentioned sections. This section therefore provides in effect for a new trial of the question of admissibility of a document to the register after the inquiry directed by Ss. 34 and 35.

S. 34 prohibits the officer from registering a document unless the executants appear within the period limited by S. 23 for the presentation of the document, and provides that in such a case an application may be made to the Registrar to enlarge the time.

There appears to be no remedy given by the Act in cases where the Registrar refuses to enlarge the time for presentation or inquiry under Ss. 25 or 34.

In the present case the respondent presented a document to a Sub-Registrar on the last day of the period fixed by S. 23 and was advised by him to present a petition to the Registrar for further time and the respondent accepted his advice and applied accordingly under S. 25. It is clear that the Sub-Registrar should have accepted the document for registration, and that the party should then have applied to the Registrar under S. 34. I think that it is equally clear that the Sub-Registrar did not refuse to accept the document for registration and did not consider whether it was admissible to the register, and therefore did not refuse to admit it to registration, but merely offered

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Bakewell, J.

advice. There was therefore no order refusing to admit the document to registration from which an appeal would lie under S. 72, and no order of the Registrar refusing to direct registration under that section.

S. 77 is expressly limited to orders of refusal under Ss. 72 or 76, and when there is no such order a suit will not lie thereunder.

The subsequent proceedings by the respondent were taken after the expiration of the period limited by S. 23 and after the order of the Registrar refusing to enlarge the time and the Sub-Registrar and Registrar were prohibited by that section from accepting the document for registration, and the orders passed by them were therefore not orders refusing to admit a document to registration within the meaning of the Act.

If the respondent had followed the procedure prescribed by S. 34 it would still have been within the discretion of the Registrar to refuse an enlargement of the time, and I do not think that the Act provides any means of revising such an order. If the action of the Sub-Registrar be taken as equivalent to an acceptance of a document for registration and a refusal to admit it to registration under S. 34 it would seem that the respondent has not adopted the remedy prescribed by that section. If, however, the application for enlargement of time be regarded as made under S. 34 and not under S. 25, the Registrar has exercised his discretion by refusing further time.

If under the circumstances of this case the Court passed a decree directing the document to be registered it would in my opinion be either exercising a discretion expressly conferred upon the Registrar or revising his order refusing to enlarge the time for acceptance of a document; and the Act gives no such jurisdiction to the Court.

It is regrettable that the Sub-Registrar should have tendered and the respondent have accepted advice which was not in accordance with the provisions of the Act, but the Act does not appear to afford any remedy, unless the action of the Sub-Registrar be held not to fall within S. 86.

I respectfully dissent from the dictum contained in *Narasimha Nayanim Varu* v. *Ramalinga Row* [1] which is not binding on this Court and accept the ruling in *Gangava* v. *Sayava* [2] which draws a distinction between a refusal to accept and a refusal to register a document.

There has been no argument before us as to whether proceedings could be taken otherwise than under the Act against a Registrar or a Sub-Registrar who has refused to accept a document for registration, but in the case of a Sub-Registrar I am inclined to the opinion that

1. (1899) 10 M. L. J. 104. 2. (1899) I. L. R. 21 B 699.

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S. 68 provides a remedy. I would allow this appeal and restore the decree of the District Munsif with costs throughout.

Seshagiri Aiyar, J. :—As my learned brother has taken a different view, my judgment which confirms that of the lower Appellate Court prevails. In the result the Second Appeal is dismissed. As the respondent does not appear there will be no order as to costs.

A. V. Visvanatha Sastri for *G. S. Ramachandra Aiyar* for the Appellant.

K. S. Ramabhadra Aiyar (amicus curiae) for the Respondent.

The Court delivered the following

Judgment :—We agree with Seshagiri Aiyar, J., that this case falls within S. 77 of the Registration Act. This is in agreement with the interpretation adopted by our Court in *Narasimha Nayanim Varu* v. *Ramalinga Row* [1], and *Sivarama Pattar Kariakar* v. *Krishna Aiyar* [2], and we also may point out that the rules framed under the Act are in accordance with this view.

A contrary view, it is true, has prevailed in *Gangava* v. *Sayava* [3], but the fallacy of the reasoning in that case, if we may say so with respect, lies in thinking that there is any substantial distinction between refusal to accept a document for registration and a refusal to register within the meaning of S. 77 read with Ss. 76 and 72. Here the District Registrar had in fact refused to direct registration of the document and none the less so because he made no enquiry as to whether the document was executed or not, proceeding on the ground that the document was in his opinion presented out of time.

We may mention that a ruling referred to at the bar in *Kunhimmu* v. *Biyyathamma* [4], can be distinguished on the ground that the appeal to the Registrar in that case having been presented after the expiry of the prescribed period, it was considered as if there was no appeal and admittedly where there has been no appeal to the Registrar no suit will lie under S. 77. There are also some observations in *Balambal Ammal* v. *Arunachala Chetti* [5], and *Veeramma* v. *Abbiah* [6], which might be taken to support the interpretation put upon S. 77 in *Gangava* v. *Sayava* [3], but they are in the nature of *obiter dicta*.

1. (1899) 10 M. L. J. 104.
2. (1914) 26 M. L. J. 307.
3. (1899) I. L. R. 21 B. 699.
4. (1884) I. L. R. 7 M. 585.
5. (1894) I.L.R. 18 M. 255 at 256.
6. (1894) I. L. R. 18 M. 99.

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It is also argued that the suit is barred. But time should be computed from the order of the Registrar, dated the 1st February 1913, when on appeal, he refused to direct the registration and not from his previous order refusing to extend time.

The appeal is dismissed.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE COUTTS TROTTER AND MR. JUSTICE SRINIVASA AIYANGAR.

Imbichi ... *Appellant* * *(Plaintiff)*.

v.

Achampat Avukoya Haji and others ... *Respondents (7th Defendant and Defendants 1 to 6)*.

Imbichi v. Achampat Avukoya Haji

Transfer of Property Act, S. 100—*Charge—Validity of—Charge to secure a liability which may arise in the future.*

An instrument by which a liability not existent *in praesenti*, but which will arise, if at all in the future is secured, may create a present charge within the meaning of S. 100 of the Transfer of Property Act.

Where in a partition deed between the members of a joint family it is provided, that if owing to the default of two of the dividing coparceners the debts which they had undertaken to pay should have to be paid by the others, then the persons who paid should recoup themselves out of the properties allotted to the defaulting parties creates a present charge within the meaning of S. 100 of the Transfer of Property Act.

Second appeal against the decree of the District Court of South Malabar in A. S. No 360 of 1913, preferred against the Decree of the Court of the District Munsif of Parapanangadi in O. S. No. 192 of 1912.

C. V. Anantakrishna Aiyar and *K. P. Ramakrishna Aiyar* for Appellants.

Dr. S. Swaminathan for Respondents.

The Court delivered the following

Coutts Trotter, J.

Judgments :—*Coutts Trotter, J.* :—In this case there was a partition and in that partition it was provided that certain debts should be paid by two of the separating co-parceners and certain other debts by the others. There was, also, a partition of the properties between them and it was provided that in case two of the dividing coparceners, who are called Nos. 1 and 2, fail to discharge the debts that were allotted to their portion to be discharged, then they as well as the properties allotted to them should be liable for the losses resulting therefrom. In plain English: If owing to the default of two of the dividing co-parceners the debts which they

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* S. A. No. 910 of 1914. 21st September, 1916.

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Coutts Trotter, J.

had undertaken to pay should have to be paid by the others, then the persons who paid should recoup themselves out of the properties allotted to the defaulting parties.

Now the learned Judge has held that this deed of partition Ex. D. did not create a 'charge' under S. 100 of the Transfer of Property Act and in coming to that decision he bases himself upon a decision in *Madho Misser* v. *Sidh Binaik Upadhya* [1]. Now that decision as well as *Harjas Rai* v. *Naurang* [2] is capable of two constructions. It is capable of being construed as deciding that the instrument in that case was in fact, not a present charge to secure against a future contingent liability, but a mere contingent charge arising on the happening of a possible future event. If the two cases mean that, there is no particular harm in that though whether one would agree with the view they take of the construction of the particular instruments is another question. But if they are opposed to enunciate the proposition which is contended for here—and nothing short of that proposition will avail the respondent — namely wherever you have a charge to secure a liability which is not a liability existent *in praesenti* but will arise, if at all, in the future, that that cannot be a present charge within the meaning of the Transfer of Property Act,—then I think this Court is bound to say that those decisions, if they mean that, are bad law and should not be followed. The most forcible illustration, I think, is the one given by my learned brother, of a Government servant who gives security by the deposit of fidelity bond or other security for the faithful discharge of his duties. Is the charge bad, because he has not been dishonest at the time the deposit is made? Another equally good illustration is the case of a man who while his account is in credit at the bank, deposits his title-deeds to secure any future overdrafts there may be. It is idle to contend that those are not perfectly good charges on the property over which they purport to operate, notwithstanding the fact that the indebtedness in both cases is future and is contingent.

As I say if those cases in Calcutta and Allahabad are to be supposed to decide the proposition contended for, we decline to follow them.

The appeal must be allowed and the decree of the District Munsif will be restored with costs here and below.

Srinivasa Aiyangar, J.:—I agree.

C. A. S.

1. (1887) I. L. R. 14 C. 687.

2. (1906) 3 A. L. J. 220.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE COUTTS TROTTER AND MR. JUSTICE SESHAGIRI AIYAR.

Devarapalli Ramalinga Reddi and others ... *Appellants* * (*Defendants Nos. 1 to 7 and 12*).

v.

Srigiriraju Kotayya and others ... *Respondents* (*Plaintiffs and Defendants Nos. 8 to 11, 13 and 14*).

Ramalinga Reddi *v.* Kotayya

Evidence Act, S. 35—Madras Act III of 1899 (*Registration of Births and Deaths Act*)—*Ss.* 4, 5 *and* 17—*Death register kept by village Karnam or Reddi—Admissibility thereof and of its public extract—Board's proceedings dated* 5—2 1874—*Effect.*

By virtue of the Board's proceedings dated 5th February 1874 a village Karnam or a Reddi keeping a register of deaths acts as a public servant in the discharge of his official duty within the meaning of S. 35 of the Evidence Act and a register which is so kept by him under the directions of the Board of Revenue since the year 1865 is admissible under the first part of S. 35 of the Evidence Act, quite apart from Madras Act III of 1899 (Registration of Births and Deaths Act). Such a register is admissible also under the second part of S. 35 because the maintenance thereof by a village officer is obligatory under Madras Act III of 1899.

A public extract of such a register is evidence of the actual date of the death mentioned in it.

Appeal against the decree of the Court of the Additional Temporary Subordinate Judge of Guntur in O. S. No. 42 of 1914.

T. V. Venkatarama Aiyar and *R. Rajagopala Aiyar* for the Appellants.

T. Prakasam for the Respondents.

The Court delivered the following

Judgment:—This is an appeal from a decree in a suit brought by a reversioner to recover possession of the properties belonging to one Pedda Venkatarayudu, the last male owner. His daughter Venkamma was in possession until she died. The first question argued before us related to the date of the death of this woman. The plaintiffs' allegation was that she died on the 9th January 1902. The 12th defendant stated that Venkamma died in 1899 and that the suit was barred by limitation. The Subordinate Judge came to the conclusion that the plaintiffs' suit was in time. The main argument against this conclusion was that Exhibit A, the

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* A. S. No. 71 of 1916. 19th February, 1917.

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public extract of the register of the death of Venkamma was not receivable in evidence, and that the judgment of the Subordinate Judge which is mainly based on that document should be reversed.

The learned Vakil for the appellants broadly contended that this document is not receivable in evidence under S. 35 of the Indian Evidence Act. He argued that there is no legislative enactment making it compulsory upon village officers to maintain a register of this kind and that an extract from such a register is not covered by S. 35. There are two answers to this contention. In the first place, Madras Act III of 1899 provides for village officers beyond Municipal towns keeping a register of Births and Deaths. Under S. 5, the Collector may appoint any person either by name or by virtue of his office to be Registrar of Births and Deaths in each village. There are provisions in the Act for such registers being sent up to the taluk cutcherry.

Under S. 17, the extracts given in the Taluk office are required to be certified as provided in S. 76 of the Indian Evidence Act. Such extracts may be produced in proof of the entries of which they purport to be copies. It is, therefore, clear that the record of death would be an entry made in a public register as required by the Evidence Act. It is true that under S. 2, the Local Government has to extend the operation of this Act to the districts. On such a notification, S. 4 would enable the Collector to proclaim that registration shall be compulsory. As the point has been taken for the first time in appeal and as the appellants denied the existence of any legislative enactment on the subject, the respondent has not been able to ascertain whether the Act has been extended to the District of Guntur and whether the registration has been made compulsory in that District. But even apart from this question, we see no reason for holding that the register would not be covered by the language of S. 35 of the Evidence Act. The entry spoken of in the first part of the section must either (a) be made by a public servant in the discharge of his official duty or (b) by any other person in the performance of a duty specially enjoined by the law of the country. The second part alone relates to legislative enactments; the first part is general in its terms. A reference to the Standing Order No. 101 of the Board of Revenue shows that the system of registering Births and Deaths was inaugurated in 1865; by the Board's proceedings dated 5th February 1874 the duty of keeping such registers was cast upon

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the village officials. It is clear, therefore that a village Karnam or a Reddi keeping a register of Deaths will be acting as a public servant in the discharge of his official duty. It is not necessary that a public servant should be compellable by legislative enactment to discharge such a duty. In *Ratcliff* v. *Ratcliff and Anderson* [1], it was pointed out that a register of Births and Deaths kept under the orders of the East India Company was a public document of the description mentioned in S. 35 of the Evidence Act. Lord Campbell in that judgment speaks of the register having been kept in obedience to directions given by the East India Company in its sovereign capacity. No legislation of the company is referred to as having authorised the keeping of such a register. We are therefore of opinion that even apart from Act III of 1899 the registers which are being kept under the directions of the Board of Revenue since the year 1865 do come under S. 35 of the Evidence Act. It need hardly be stated that the Board of Revenue are the agents of the Executive Government of the Presidency. (See *The Secretary of State for India in Council* v. *Kasturi Reddi* [2].)

One other argument of the learned Vakil for the appellants was that the extract is not evidence of the actual date of the death mentioned in it. Reliance was placed upon certain observations contained in *In re Wintle* [3]. It is clear that these observations have not been accepted as good law in England, See *In the Estate of Goodrich: Payne* v. *Bennett* [4]. We are therefore of opinion that Exhibit A was rightly admitted in evidence and that it is evidence of the actual date of the death.

Upon the facts we have no hesitation in concurring with the conclusion of the Subordinate Judge that the plaintiff had proved that Venkamma died within twelve years of the date of suit. The evidence let in on behalf of the defendants is utterly worthless, having regard to the fact that the 12th defendant who professes to have known the date of the death all along did not state it in the written statement filed by him.

Another contention was that Chinna Venkatarayudu and Pedda Venkatarayudu were not divided; but the documentary evidence on the question is very clear. Exhibits L. N and Z of the year 1860 show that by that time the two brothers had become divided in status.

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1. (1859) 1 Sw. and Tr. 467.
2. (1902) I. L.R. 26 M. 268.
3. (1870) L. R. 9 Eq. 373
4. (1904) P. 138.

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Then it was suggested that the family compromise evidenced by Exhibit D, is binding upon the present plaintiffs. The contest in that case was between the widow of a co-parcener who claimed maintenance from the family and the 12th defendant's father. The 12th defendant's father claimed that he was entitled to the whole of the property; he entered into a compromise. The present plaintiffs were not parties to the compromise and by no stretch of imagination can they be said to have been represented either by Bangaramma or by the 12th defendant's father. We hold that the compromise is not a family arrangement binding upon the plaintiffs. We must, therefore, for these reasons confirm the decree of the Subordinate Judge and dismiss the appeal with costs. We dismiss the memorandum of objections also with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE SRINIVASA AIYANGAR.

Avasarala Kondal Row and another. v.	...	*Appellants* *(*Plaintiffs*)
Iswara Sanyasi Swamulavaru *alias* Avasarala Kamarazu and others.	...	*Respondents (Defendants Nos. 1 and 2, legal representatives of 3rd defendant and defendants Nos. 5, 4 and 6 to 15).*

Kondal Row v. Iswara Sanyasi.

Hindu Law—Sanyasam—Essentials of—Rites and ceremonies necessary for—Relinquishment or abandonment of property—Necessity—Praisha Mantram—*Necessity—Distinction between ascetic of heretic sect and Orthodox Sanyasin.*

The essential feature of an Orthodox Sanyasam is the actual relinquishment of all property and an actual abandonment of all worldly concerns, down to even a desire for them. There need not necessarily be an actual transfer to, or a relinquishment in favour of, any particular person, but one about to become a Sanyasi may simply abandon his property in which case the law will vest it in his heirs.

The *Praisha mantram* is absolutely essential for an Orthodox Sanyasam.

Rites and ceremonies necessary to be performed for becoming an Orthodox Sanyasin.

Distinction between an ascetic of one of the heretical sects and an Orthodox Sanyasin.

Appeal against the decree of the Court of the Subordinate Judge of Cocanada in Original Suit No. 7 of 1909.

The Hon'ble the Advocate-General, (S. Srinivasa Aiyangar) (S. Desikachariar with him*)* for Appellants.

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* A. No. 196 of 1914. 13th February, 1917.

Kondal Row v. Iswara Sanyasi.

T. R. Ramachandra Aiyar, (N. A. Krishna Aiyar with him) for Respondents.

The Court delivered the following

Srinivasa Aiyangar, J.

Judgments :—*Srinivasa Aiyangar, J.*—This is an appeal by the plaintiffs against the decree of the Subordinate Judge of Cocanada dismissing their suit to recover possession of the immoveable properties belonging to the 1st defendant, from him and his alienees. There are 2 plaintiffs, but as the 2nd is only an assignee from the 1st and as it is the right of the first plaintiff that is in question in the suit, I shall hereafter refer to the 1st plaintiff as the plaintiff. The claim is as the universal legatee, heir and successor of a living person the 1st defendant. According to the plaintiff the first defendant his uncle, made his will on the 20th December 1905 at Benares by which he bequeathed all his immoveable properties—they are the suit properties—to the plaintiff, constituted him his heir and successor, and a few days after, became a Sanyasi or entered the fourth asrama prescribed by the sastras, became dead to the world and its concerns, and the plaintiff therefore became the owner of his properties as if the 1st defendant had died on the day he became Sanyasi. This remarkable claim—for this is the first instance to my knowledge of a claim to recover possession from a living person of his properties as his heir or legatee which involves the fiction of civil death—requires to be made out in the clearest possible manner. The plaintiff and the first defendant are Telugu Brahmins of the Godavari District and belong to the sect called Golakonda Vyaparies who though they wear namams and follow some of the practices of Sri Vaishnavas, in several other matters apparently follow the practices of Smarthas. Several interesting questions were argued at the hearing of this appeal, as to the acts to be done and the ceremonies to be performed by a Brahmana before he can become a Sanyasi, as to the effect of that status on legal rights, as to the possibility of a reversion from or change of that status, and as to how far British Indian Courts are bound or entitled to recognise any such limited or inferior civil status; but in the view I take of the facts it is scarcely necessary to decide most of the questions so argued.

It must be remembered that there are a large number of sects with their peculiar rites, mode of initiation and practices who though in a general sense may be termed ascetics cannot come under the category of those who have entered the fourth order

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Srinivasa Aiyangar, J.

(asrama) in the ideal of life prescribed for the Brahmana by the Dharma Sastras. For example, in a passage cited in Sarkar Sastri's Hindu Law from Maha Nirvana Tantra, it is said that in this Kali age there are five castes (*varnas*) *i.e.*, besides the well-known four castes, a fifth caste comprising all other beings, that *Sanyasam* according to Vedic rites does not exist (कलौ नास्ति) and that all the above five castes can become *avadhutha Sanyasis* according to the Saiva ritual. As regards ascetics of this class, it is impossible to apply the special texts in the Smritis or to hold that they are divested of their property or become incapable of holding any or that the special rules of inheritance prescribed for *Vanaprastas* (hermits) *Yathis* (ascetics) and *Brahmacharies* (perpetual students) govern succession to their property on their death. It has been held in this Court that as a Sudra cannot become a *Yathi* or *Sanyasi* according to the Smrithis or the Dharma Sastras, his property on his death devolves on his natural heirs, though there can be no doubt that a Sudra is ordained as an ascetic according to the Saiva Agamas. So also in Bengal the rule of inheritance applicable to *Yathis* is not applied to Bairagis who apparently may be of any caste. In Mr. Oman's book on 'Ascetics etc.,' and Dr. Bhattacharya's book on 'Hindu Castes and Tribes' are described a considerable number of orders of ascetics who are not governed by the rules prescribed in Smritis or by Nibandakars whom for convenience I may call heretical sects; and so far as they are concerned, in the absence of any special custom, there is no reason to treat them as of inferior status for the purposes of Civil Law. Unless therefore the plaintiff proves that the 1st defendant became a *Sanyasi* according to the orthodox rites and ceremonies—I shall show later on that it is essential for such a *Sanyasam* that there should be an actual gift or an actual relinquishment or abandonment of all worldly possessions—the plaintiff cannot succeed, even though he may be able to prove that the 1st defendant wore coloured clothes or shaved his head or acquired certain external symbols of *Sanyasam*; for some or all of these are adopted also by the heretical sects.

[Then His Lordship after discussing the evidence proceeds as follows.]

Assuming however that that evidence is true and the witnesses accurately describe what they saw, yet the evidence appears to be insufficient to prove that the 1st defendant entered the holy

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Srinivasa Aiyangar, J.

order of *Sanyasis* by the performance of the necessary rites and ceremonies prescribed by the *Sastras*; in particular there is no evidence that the 1st defendant pronounced the *Praisha Mantram* which is absolutely essential for an orthodox *Sanyasam*. The ideal ascetic is he who having passed from order to order, having paid the three debts (that to the *Rishis*, to the *Pithris* and to the *Devas*) in the evening of his life tired of the world gives up everything and determines on passing the remainder of his days in holy meditation calmly awaiting his release. (Manu, Ch. VI, v. 33 to 37 and 45. *Jabala Sruti* cited in Apararka's commentary on Yajnavalkya and Yajnavalkya, Ch. III, v. 57). The essence of such *Sanyasam* as the word itself imports, is the relinquishment of all property and worldly concerns even of the desire for them. In the Taithireya Upanishad, it is said 'not by works, not by sons, not by wealth, but by relinquishing these some obtained immortality.' "Getting out of the desire for sons, for wealth, and the world, a Brahmin goes into mendicant state.'" (*Bikshacharyam charanti Vajasayena Brahmanam* cited in Parasara Madhaviyam, Bombay Sanskrit Series, Vol. 48, page 152. The rituals to be followed by a person desirous of becoming a *Sanyasi* are indicated in the Smritis and are set out in detail in the works of the commentators and text book writers (Manu, Ch. VI, verses 38, 39, 41, 43; Baudhayana II. 10, 17; Parasara Madhaviyam, pages 146 to 178; Dharma Sindhu, pages 363 to 370, Bombay Edition).

The postulant for *Sanyasam* after learning the duties of a *Sanyasi* should first perform his death ceremonies,—this however is by some not considered necessary,—and the eight *sradhas* the last of which is his own *sradha*; he must then distribute his wealth to his sons and brahmins reserving enough for the *homam* (sacrifice in the fire) to be subsequently performed. Then he has to perform *Prajapathyeshti* or *Agneshti* and finally *Viraja Homam*. These are sacrifices in fire and are purificatory ceremonies. At the end of ceremonies the postulant has no property at all for even the sacrificial vessels if they are of wood must be burnt in the fire and if they are of metal must be given to the priest. After these are done he takes leave of his sons, and standing in water takes some water in his hand and drops it saying that he has given up desire for sons, wealth, world and everything (*Sarva Thyagam*). He makes a vow that he will not injure any living being. Finally there

is the uttering of the '*Praisha Mantram.*' The literal meaning of the *Mantram* is 'have been given up by me' (*Sanyastham maya*). The *mantram* is to be pronounced low three times, and loud twice and till the *mantram* is pronounced the man does not become a *Sanyasi.* The above is common to all *Sanyasams*, but there is a difference of opinion as to the discarding of the sacred thread, as to the shaving of the tuft and as to the number of sticks in the staff. This is due to certain doctrinal differences which it is unnecessary to deal with for the present purpose beyond saying this; that the discarding of the holy thread which implies the giving up of all the duties prescribed not merely for the order (*Ashrama*), but also for the caste (*varna*) including the obligatory *Sandhyavandanam*, is proper only to the highest kind of *Sanyasi*, *Paramahamsa.* It is said in the statement of the 11th defendant, that the 1st defendant became a *Paramahamsa*, but if he did, he should not have resided in a house or in a village; he can enter a village only in the evening for begging for his meals. It is to be observed that the essential feature of *Sanyasam* is the actually relinquishment of all property and an actual abandonment of all worldly concerns, down to even a desire for them; and it is said in the most emphatic terms that a person adopting *Sanyasam*, without this abandonment of all desires (*vairagyam*) goes to fearful *narakam* (Dharma Sindhu, page 364). It is clear that in this case the first defendant did not abandon or relinquish his property and had no intention of doing so; and there is no evidence that he pronounced the '*Praisha Mantram*' without which he cannot become a *Sanyasi.* The learned Subordinate Judge thinks that without relinquishing his property, a man may become a *Sanyasi*, but the *Sanyasam* would be useless; and from the verse of Yajnavalkya which prescribes a rule of inheritance for an ascetic's property, infers that a *Sanyasi* may possess property. Perhaps it is a question of words, but it appears to me that to speak of a *Sanyasi* retaining his property is a contradiction in terms. The rule as to inheritance is explained by the commentators as applying to the staff, water pot, and sandals of a *Sanyasi*, which alone is permitted to him (Manu, Ch. VI, verse 41 '*Pavitropakitiah*'). The learned Judge is not right in thinking that an ascetic can make a hoard of things for a day, a month, or six months or a year; for that can be done only by a *Vanaprastha* or Hermit. On the other hand it is said in a verse cited in Parasara Madhaviyam (page 184) that a *Sanyasi* should not even procure an extra staff for future use.

Kondal Row v. Iswara Sanyasi.

Srinivasa Aiyangar, J.

Similarly in *Gouri Sanker* v. *Naider* [1] it appears to have been held that without actually relinquishing or abandoning his property a man cannot become a *Sanyasi.*

If however the first defendant became a *Sanyasi,* his heirs would take his property and probably his legatee even during his life-time. In an interesting passage in Pollock and Maitland's 'History of English Law' the learned authors describing the status of a monk say, "A monk or nun cannot acquire or have any proprietary rights. When a man becomes 'professed in religion,' his heir at once inherits from him any land that he has, and, if he has made a will it takes effect at once as though he were dead. If after this a kinsman of his dies leaving land which according to the ordinary rules of inheritance would descend, he is overlooked as though he were no longer in the land of the living; the inheritance misses him and passes to some more distant relative. The rule is not that what descends to him belongs to the house of which he is an inmate; nothing descends to him for he is already dead. In the eye of Ecclesiastical law the monk who became a *proprietarius,* the monk, that is, who arrogated to himself any proprietary rights on the separate enjoyment of any wealth, committed about as bad an offence as he could commit." Except that the Smriti writers and commentators had no conception of a will, the above passage accurately represents the status of a *Sanyasi* under the Hindu Law. It does not seem to be necessary that there should be an actual transfer to, or a relinquishment in favour of any particular person, but one about to become a *Sanyasi* may simply abandon his property in which case the law will vest it in his heirs. In the Dayabhaga in the very beginning where the author discusses the meaning of the word '*Daya*' and origin of right to property, he points out that not merely by gift, but by death, *Sanyasam,* etc., the right of the previous owner is lost, and that of the successor begins. The same principle is applied in fixing the time for partition. The author explains that the phrase "the death of the father" does not necessarily mean actual death, but includes *Sanyasam,* etc. (Stoke's Hindu Law Books, Daya Bhaga, Ch. 1, placitum 4 and 31. The Sanskrit word translated as 'retirement' is '*Pravrajita*'). See also 2 Colebrooke's Digest, p. 197. This appears also to be the opinion of text writers (Strange, pages 164, 185; Trevelyan, p. 100;

1. (1913) 18 C. W. N 59.

Mayne, p. 828; Vyavasta Chandrika, p. 20). It is however unnecessary to pursue this matter further as I have come to the conclusion that the first defendant did not enter the fourth order as prescribed in the Dharma sastras; nor is it necessary to decide any other questions. The appeal must be dismissed with costs.

Abdur Rahim, J. :—I agree.

A. S. V.

PRIVY COUNCIL.

PRESENT:—VISCOUNT HALDANE, LORD ATKINSON, SIR JOHN EDGE AND MR. AMEER ALI.

[On appeal from the High Court of Judicature at Madras.]

T. A. Balakrishna Udayar ... *Appellant* *

v.

Vasudeva Aiyar ... *Respondent.*

Religious Endowments—Appointment of Member of Committee managing religious Endowment—Whether such appointment by a Civil Court is an administrative or a judicial act—Bengal and Madras Native Religious Endowments Act, (Act 20 of 1863) *Ss.* 7, 8, 9, 10, 14—"*Case*", *meaning of—Revisional Powers of High Court—Code of Civil Procedure,* 1908 (*Act V of* 1908) *S.* 115.

S. 10 of the Bengal and Madras Native Religious Endowments Act, 1863, does not empower the Civil Court to direct the remaining members of a Committee appointed under that Act, when they have failed to hold an election for the choice of a new member, to hold such an election. It can direct them to fill up the vacancy, but such filling up is then their own act.

A proceeding of the Civil Court under this section is a judicial and not merely an administrative or ministerial act. In such matters the Civil Court exercises its powers as a Court of law, not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal tribunal.

S. 115 of the Code of Civil Procedure enables the High Court, in a case in which no appeal lies, to call for the record and to pass such order in the case as the Court may think fit. The section applies to jurisdiction alone, the irregular exercise, or non-exercise of it or the illegal assumption of it; it is not directed against conclusions of law or fact in which jurisdiction is not involved.

"Case" is not defined in the Code. It cannot be confined to litigation in which there is a plaintiff who seeks to obtain a particular relief against a defendant before the Court but includes an *ex parte* application praying that persons in the position of trustees or officials should perform their trust or discharge their judicial duties. It includes therefore proceedings under S. 10.

Appeal against an order of the High Court of Madras, (*Sir Arnold White, C. J., and Oldfield, J.*) reversing an order of the District Judge of Tanjore.

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* 24th April, 1917.

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The facts of the case are sufficiently stated in their Lordships' judgment. The Judgment of the High Court is reported in 25 M. L. J. 536.

De Gruyther, K. C., and *J. H. C. Sproule* for Appellant:—The whole scheme of Act 20 of 1863 is that the persons interested in a religious endowment should have in the first place at all events, the right to elect when there is a vacancy in the managing committee. S. 10 is imperative: the new member "shall be elected". I submit the District Judge has power to make the committee hold an election: to do what they ought to have done.

Secondly, I submit that the District Judge's order was not a judicial proceeding and hence was not triable in revision by the High Court under S. 115 of the Civil Procedure Code. *Meenakshi Naidoo* v. *Subramania Sastri* [1].

This is not a "case" which has been "decided" within the meaning of S. 115. "Case" means "suit" or proceeding in a suit. *Subbaier* v. *Abboy Naidu* [2].

Sproule followed: The first order of the District Judge was merely a direction to "fill up" the vacancy. There is no reason why the committee should not hold an election first, and co-opt in accordance with it: it is they who "fill up" the vacancy.

Sir Erle Richards, K. C., and *Kenworthy Brown* for Respondents were not called upon.

Their Lordships' judgment was delivered (May 21, 1917) by

Lord Atkinson.

Lord Atkinson:—This is an appeal from a judgment and order of the High Court of Madras dated the 23rd September, 1913, setting aside an order of the District Judge of Tanjore dated the 19th July, 1913, by which the appellant was appointed a life member of the Devasthanam (Temple) Committee of Negapatam. This order of the District Judge purports to have been made, in the events which had happened, in exercise of the powers conferred upon him by S. 10 of Act XX of 1863, The Bengal and Madras Native Religious Endowments Act.

That section runs as follows:—

"Whenever any vacancy shall occur among the members of a Committee "appointed as above, a new member shall be elected to fill the vacancy by the "persons interested as above provided. The remaining members of the Committee

1. (1887) L. R. 14 I. A. 160: I. L. R. 11 M. 26.
2. (1915) 29 M. L. J. 671.

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"shall as soon as possible give public notice of such vacancy, and shall fix a day "which shall not be later than three months from the date of such vacancy for an "election of a new member by the persons interested as above provided under "rules for elections which shall be framed by the local Government, and whoever "shall be then elected under the said rules shall be a member of the Committee "to fill such vacancy. If any vacancy aforesaid shall not be filled up by such "election as aforesaid within three months after it has occurred, the Civil Court, "on the application of any person whatever may appoint a person to fill the "vacancy or may order that the vacancy be forthwith filled up by the remaining "members of the Committee, with which order it shall then be the duty of such "remaining members to comply; and if this order be not complied with, the Civil "Court may appoint a member to fill the said vacancy."

By the second section the words "Civil Court", "and "Court" are defined to mean "the Principal Court of Original "Civil Jurisdiction in the district in which the mosque, temple "or religious establishment is situate relating to which or to the "endowment whereof any suit shall be instituted or application "made under the provisions of this Act." It would appear that, if the endowments of the temple be situate in districts other than that in which the temple or religious establishment is itself situated, different Courts may in relation to it and its affairs be Civil Courts within the meaning of this definition. Moreover, it is to the Civil Court and not to an individual Judge who may preside in, or constitute the Civil Court that jurisdiction is given.

A vacancy occurred in the above-mentioned Committee by the death on the 3rd May, 1912, of the Honourable Dewan Bahadur R. Raghunatha Rao, C. S. I. The Committee did not hold any election of a member to fill this vacancy. On the contrary, they on the 20th June, 1912, directed their managing member to request the then District Judge of Tanjore, Mr. A. F. G. Moscardi, to nominate, in exercise of the powers conferred upon him by the above-mentioned section, a person to serve upon the Committee. That request was duly made by the managing member by letter addressed to the District Judge on the 16th July following.

The District Judge, having considered this letter, made an order on the 1st October, 1912, requesting the managing member to report "if there was any reason why the Court should not "order that the vacancy should be filled up by election, as "provided in S. 10 of the Act." It is clear from this letter that the District Judge considered he had under the statute jurisdiction to order the Committee to hold an election of a member in order to fill the vacancy; and though an order which he subsequently

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made upon the 6th January, 1913, is very guarded in its terms it has been assumed that he meant to exercise this jurisdiction.

On the 21st October, 1912, the managing member replied to the District Judge's communication of the 1st October, 1912, forwarding a copy of a resolution passed by the Committee in the previous June to the effect that they would not hold an election, and renewing the request to the Judge to nominate a member. On the 2nd January, 1913, the present respondent, in the character of a person interested, filed a petition in the District Court praying the Court to fill up the vacancy in the Committee by nomination, on the ground that the list of voters was stale, and that delay would occur in preparing a new list. The same District Judge, Mr. Moscardi, made on this petition the order already referred to of the 6th January, 1913. On the face of the order it is set forth that it was argued—

"that the intention of the Legislature in S. 10 of the Act was clearly that such "vacancies should be filled by the Committee by election, and only in the last "resort by the Court."

It is also pointed out that—

"the Committee had a voters' list drawn up so recently as 1909; that there was "no reason why an election should not be held in this case .. and no....reason was "urged why the provisions of S. 10 of the Act should not govern this case."

The last paragraph of the Order runs thus :—

"It is clear to me that it is the duty of the Committee to fill up the vacancy "by election, and that there is no obstacle preventing them from doing so. I "therefore order that the vacancy be forthwith filled up by the remaining members "of the Committee. Time, three months."

It will be observed that it is not stated explicitly in this order by what process the Committee are to fill up the vacancy, whether by election or by nomination or co-option. The members of the Committee, however, owing possibly to the matters already referred to set forth on the face of the order, came to the conclusion that by it they were directed to hold an election which, on the 24th March, 1913, they accordingly did. The appellant was the only candidate; 1,745 votes were recorded for him. The Committee thereupon declared him duly elected, and reported the result to the District Court.

About this time a new Judge, Mr. C. G. Spencer, was appointed to the District of Tanjore, and during the months of April and June certain applications were made to him with which it is quite unnecessary to deal.

Four petitions were then presented to the District Court, one bearing date the 23rd June, 1913, by the present appellant, praying that it might be declared that his election was valid, and that he might be permitted to perform his duties ; one of the same date by the present respondent alleging that the election was void, and praying that the Court might, by its own nomination, fill the vacancy ; and two bearing the respective dates of the 17th May, 1913, and 18th July, 1913, by one Dakshinamoorthi Pillai, praying that the election might be declared void for several reasons, including amongst others the alleged defective nature of the voters' lists.

On the 19th July, 1913, the District Judge, Mr. C. G. Spencer dealt by one order of that date with the matters of these four petitions, and decided that the election of the present appellant was regular, and accepted him as a member of the Committee, on the ground that upon the true construction of the 10th section of the aforesaid Act of 1863, the words, " or may order that the vacancy be forthwith filled up by the remaining members of the Committee," must be taken to mean by implication "filled up by the members of the Committee, by election," since that is the mode prescribed in the earlier portion of the section for filling up a vacancy by them. It will be observed that this order is based upon the assumption that the earlier order of Mr. A. F. G. Moscardi of the 6th January, 1913, was in effect an order directing the Committee to fill up the vacancy by holding an election, and that it was understood and acted upon by them as such.

The present respondent upon the 6th August, 1913, presented a petition to the High Court asking for a revision of this order under the 115th section of the Code of Civil Procedure, to which he made the present appellant and Temple Committee respondents. On the application coming on for hearing, a preliminary objection was raised that a petition for revision of the adjudication of the District Court did not on the legal construction of the statute in such a matter as that dealt with in S. 10 of the Act of 1863 lie.

The High Court held that this objection failed, and proceeded to deal with the merits of the application. In reference to them they held that, according to the true construction of the 10th section, the District Court had no jurisdiction whatever to order the remaining members of the Committee (as it was taken it had

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ordered them) to fill up the vacancy by means of an election, or to validate the filling up of it by these means in obedience to such an order, and ordered that the order of the District Judge, Mr. Spencer, dated the 19th July, 1913, should be set aside, as made without jurisdiction, and that the case should be sent back to be dealt with by the District Court by the light of this judgment.

On the hearing of this appeal both these points have been raised and argued. In their Lordships' view the decision of the High Court was on both points right, and they fully concur in and approve of it.

As to the preliminary objection. The 115th section of the Civil Procedure Code enables the High Court, in a case in which no appeal lies, to call for the record of any case if the Court by which the case was decided appears to have acted in the exercise of a jurisdiction not vested in it by law, or to have failed to have exercised a jurisdiction vested in it, or to have exercised its jurisdiction illegally or with material irregularity, and further enables it to pass such an order in the case as the Court may think fit.

It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. And if the appellant's contention be correct, then if the Civil Court should absolutely and whimsically decline to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, there would not, in a case such as the present, be any remedy available under this section and no appeal would lie.

The act of the District Court complained of in the present case was an adjudication by it that the present appellant having been elected in pursuance of an order of the Court was a member of the Committee. The words of the statute are: "And whoever shall be then elected under the said rules shall be a member of the Committee to fill such vacancy." If the election be valid and regular, the person elected becomes a member of the Committee without any consent or approval being given by the District Court. It is contended, however, that the making of this order, necessarily involving, as it does, the construction of the statute—a pure matter of law—is not a judicial, but merely an administrative or ministerial act. A key, it would appear to their

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Lordships, as to the true position of the Civil Court under this 10th section may be found by referring to the position it occupies under the immediately preceding and some of the succeeding sections of the Act. Section 9 provides that every member of a Committee appointed under sections 7 and 8 shall hold office for life unless removed for misconduct or unfitness, and no such member shall be removed except by order of the Civil Court. Surely in such a question as the emotion of an officer from his office for misconduct or unfitness, the Court which makes the order removing him is exercising judicial functions ? Any order made in such a matter in disregard of the requirements of natural justice, such, for instance, as proceeding without giving the member sought to be removed notice, or affording him an opportunity of defending himself, would clearly be voidable or void.

Again, under S. 14, any person may sue in this Civil Court the manager or superintendent of the mosque or the members of this very Committee for breach of trust or misfeasance. And the Court might decree specific performance of any acts to be done by either of these functionaries, might award damages against him or might remove him from office. Under S. 16 the Court, in a suit pending before it, might refer the matter to arbitration.

It appears to their Lordships to be clear that in all these matters the Civil Court exercises its powers as a Court of Law, not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal tribunal.

It was next contended that the matter of the four petitions in which the order of the 19th July, 1913 (was made), did not constitute a "case" within the meaning of the 115th section of the Code of Civil Procedure. No definition is to be found in the Code of the word "case." It cannot, in their Lordships' view, be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court. It must, they think, include an *ex parte* application, such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official duties. Their Lordships concur, therefore, with the High Court in thinking that the matter adjudicated upon was a case within the meaning of the 151th section of the Code,

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The case of *Meenakshi Naidoo* v. *Subramaniya Sastri* [1], decided by this Board, is wholly different from the present. There the District Judge had, under this section 10, by his order appointed the appellant to fill a vacancy in the Temple Committee. An appeal was taken from this order, on the ground of the appellant's unfitness for the post by reason of his religious belief. The question of the jurisdiction of the Civil Court to make the order was not raised. It was not pretended that a right of appeal—which, if given at all, must be given by statute—was given by Act XX of 1863 ; but it was contended that it was given by the 540th section of Act X of 1877, which gives a general right of appeal from decrees of Courts exercising original jurisdiction. The definition of the word "decree" given in this Act is modified by Act XII of 1879. and as modified, runs as follows :—

"'Decree' means a formal expression of an adjudication upon any right, claim, or defence set up in a Civil Court where such adjudication decides the suit or the appeal."

Well, it is obvious that an order made by the Civil Court on an application which may be made by "any person whatever," appointing a particular man to fill a vacancy on a committee, is not a "decree" within the meaning of this definition. The Board, on that occasion, carefully abstained from expressing any opinion upon the question whether proceedings, somewhat in the nature of *quo warranto*, could be taken to remove a person improperly appointed.

On the point of substance on the merits it was next contended that when a vacancy amongst the members of a committee occurs the statute imposes upon the remaining members a statutory duty to hold, within three months from the date of the vacancy, an election in the manner provided by the rules for the choice of a new member to fill this vacancy, and that if these members fail to discharge this statutory duty the jurisdiction of the Court is in the first instance confined to either itself appointing a person to fill the vacancy, or to making an order, somewhat in the nature of a mandamus, to compel them to perform their statutory duty. Well, in the first place it is admitted that the section does not expressly provide anything of the kind, and in the next place some of its provisions make it impossible to imply anything of the kind.

1. (1887) L. R. 14 I. A., 160=I. L. R. 11 M. 26.

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In the case of an election, public notice must be given as soon as possible after the occurrence of the vacancy, and the election must be held within three months after that date; but the Order of the Court requiring the remaining members of the Committee to forthwith fill up the vacancy may not be made till long after this period of three months has elapsed. It would in such a case be impossible to fulfil the statutory condition as to the time for holding the election. Again, the order is to be to the effect that these members shall forthwith fill up the vacancy, which seems to exclude all the delays contemplated where an election is held; and again where an election is held the remaining members of the Committee merely act as the returning officer. They do not in any sense fill up the vacancy. The electors elect a person to be the new member, and upon his election by them he, according to the statute, "shall be a member of the Committee to fill the vacancy." If in such a case the vacancy can properly be said to be filled up by anybody, it is by the electors rather than by the remaining members of the Committee that this is done, whereas the order to be made in case of their default contemplates, and indeed directs, that these members themselves are to fill up the vacancy. The filling of it up is to be their act. It is to be done by them forthwith, without the aid or intervention of any electors or other persons, and it would appear to their Lordships it must be an act kindred in character to that which the Court itself may do, namely, appoint a person to fill the vacancy. It was also urged that if this construction of the section be adopted it would enable the remaining members of the Committee, by their own default, practically to disfranchise the electors, and at the discretion of the Court possibly procure the patronage for themselves. That no doubt is so, and before a legislative body empowered to amend the statute, it might furnish a powerful argument for its amendment: but the function of this Board is to declare the law, not to alter it, and the argument cannot therefore here avail. In addition it is to be remembered that where the Civil Court appoints, the electors are by and through the same default of the same members of the Committee equally disfranchised, yet that is expressly authorised by the statute. The Court must be trusted not to confer upon these members by its order the power to appoint where the nature and circumstances of their default show that they are unworthy of

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being trusted with the privilege of appointing a member. Their Lordships are for these reasons of opinion that the decision appealed from was right, that the appeal fails and must be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for Appellant :—*O. A. Cayly.*

Solicitor for Respondent :—*Douglas Grant.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE SESHAGIRI AIYAR.

Muthusami Nadan and another ... *Appellants* (Petitioners in Crl. R. C. No. 109 of 1916 on the file of the High Court-Respondent)*

v.

Kalinga Moopan ... *Respondent (Respondent in Crl. R. C. No. 109 of 1916 on the file of the High Court-Petitioner).*

Muthusami Nadan v Kalinga Moopan.

Criminal Procedure Code, Ss. 147, 148, 537—" *Local inquiry* " *under S.* 148 —*Whether Evidence can be taken by the officer making local inquiry—Duty of the Sub-divisional Magistrate to take further evidence—Interference under S.* 107 *of the Government of India Act,* 1915.

Where a Sub-divisional Magistrate directed a local inquiry by a Sub-Magistrate regarding a dispute, as to a right of way and the Sub-Magistrate in such enquiry examined witnesses and submitted his report and the Sub-divisional Magistrate, before whom no objection was taken to the course followed by the Sub-Magistrate, and no further evidence was tendered, passed final orders on the dispute under S. 147 basing his opinion on the report of the Sub-Magistrate, the Sub-divisional Magistrate has not acted without jurisdiction.

Arumuga Govindan v. *Venkatasubbier* [1], considered.

A local enquiry authorised by S. 148 of the Criminal Procedure Code is not merely a local inspection by the officer but such officer can take evidence in the course of such local enquiry and his report is admissible in evidence in the proceedings before the Sub-divisional Magistrate under S. 147.

The receipt of the report of the local inquiry does not absolve the Magistrate acting under S. 147 from taking any further evidence tendered before him.

Per Seshagiri Aiyar, J.—Where the Sub-divisional Magistrate bases his conclusion on the evidence taken at the local inquiry, the procedure adopted by him is irregular; but in the absence of any prejudice to the parties, such defect or irregularity of procedure is cured by S. 537 of the Code and the High Court will not interfere under S. 107 of the Govt. of India Act with such a decision.

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* L. P. A. 217 of 1916 19th December, 1916.

1. (1907) I. L. R. 31 M, 82.

Muthusami Nadan v. Kalinga Moopan.

Appeal under clause XV of the Letters Patent against the judgment of the Honourable Mr. Justice Spencer, dated the 14th September 1916 in Crl. R. C. No. 109 of 1916 preferred against the order of the Court of the Sub-Divisional 1st Class Magistrate of Trichinopoly in Miscellaneous Case No. 42 of 1914.

S. T. Srinivasa Gopalachari for Appellant.

E. R. Osborne for *Public Prosecutor* for the Crown.

K. S. Ganesa Iyer for the Respondent.

The Court delivered the following

Ayling, J.

Judgments :—*Ayling, J.*—This is a Letters Patent appeal against the decision of the Honourable Mr. Justice Spencer passed on a petition presented under S. 15 of the Charter Act, (S. 107 of the Government of India Act), for the setting aside of an order of the Sub-Divisional Magistrate of Trichinopoly under S. 147 of the Criminal Procedure Code. The learned Judge held that the Sub-Divisional Magistrate's order was not without jurisdiction and declined to interfere.

As observed in *Kamal Kutty* v. *Udayavarma Rajah Valia Rajah of Chirakkal* [1] it has never been customary to interfere in cases of this sort under S. 15 of the Charter Act, unless the Magistrate's order was passed without jurisdiction; and we have merely to consider whether that was the case with the order before us.

The chief ground of attack is that the Magistrate recorded no evidence himself but forwarded the records to a Subordinate Magistrate under S. 148 of the Criminal Procedure Code for trial, enquiry, and report after taking evidence and based his order on the said report and the oral evidence recorded by the Sub-Magistrate.

Appellants' first contention is that the term "local enquiry" in S. 148 of the Criminal Procedure Code means merely "local inspection" and that the order directing the Sub-Magistrate to record oral evidence on the spot is *ultra vires*. The word "inquiry" frequently occurs in the Criminal Procedure Code; but nowhere, so far as I know, with this very limited meaning. The main authority for appellants' contention is the opinion of Prinsep, J., in a very old case reported in *In the matter of Baikunt Kumar* [2], White, J., who sat with him in that case treated the matter as doubtful; but both learned Judges appear to have been of the opinion, that evidence might legally be recorded by a

1. (1912) I. L. R. 36 M. 275. 2. (1878) 3 Cal. L. R. 134.

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Sub-Magistrate with the assent of parties and that they might even agree to be bound by the result of the inquiry thus held. To what extent Prinsep, J.'s view was shared by the learned Judge in *Arumuga Govindan* v. *Venkatasubbiar* [1], is not clear, but as at present advised I am not prepared to assent to the proposition that the local inquiry authorised by S. 148 is only a local inspection, or that the Sub-Magistrate's report in this case was not admissible in evidence.

What seems to be clear is, that whatever the scope of the said inquiry, the receipt of the Sub-Magistrate's report does not absolve the Sub-Divisional Magistrate from the duty imposed on him by S. 145 (4), of receiving any evidence produced before him by the parties, and taking any further evidence he may find necessary. This if I understand it right, is the true meaning of the pronouncement in *In the matter of Baikunt Kumar* [2], as well as in Criminal Revision case No. 243 of 1892 of this Court, reported in *Hanumanthappa* v. *Hussain Saheb alias Aiyah* [3] and in *Kolha Koer* v. *Muneswar Tewari* [4]. In the present case there is nothing to indicate that the parties were desirous of adducing any further evidence before the Sub-Divisional Magistrate, though he gave a hearing to both sides after receipt of the Sub-Magistrate's report. In fact so far as appears, both parties were quite content to abide by the result of the Sub-Magistrate's inquiry, and the Sub-Divisional Magistrate even notes, at the end of paragraph 4 of his order that before him they advanced no arguments against the Sub-Magistrate's finding. The present objection seems to be a pure afterthought, put into the head of the unsuccessful party.

Whether in case the Sub-Divisional Magistrate had declined to take evidence tendered before him, this would have amounted to a defect of jurisdiction is a matter we need not decide. The learned Judges in *Kolha Koer* v. *Muneswar Tewari* [4] held that it would, or that it was at any rate a matter justifying their interference.

That in the absence of such refusal, the order in the present case should be treated as one without jurisdiction, I see no reason to hold and in so far as the decision of the learned Judge in *Arumuga Govindan* v. *Venkata Subbier* [1] seems to lay down such a proposition I must most respectfully dissent from it.

1. (1907) I. L. R. 31 M. 823
2. (1878) 3 C. L. R. 184.
3. (1892) 2 Weir 118.
4. (1907) I. L. R. 34 C. 840.

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The second point is that the Magistrate's order contains no finding that the right of way in question was exercised within 3 months before the inquiry. This, as pointed out by Spencer, J. was never raised in the Magistrate's Court, and I think we should decline to make it a ground of interference now.

I would dismiss the appeal with costs of the Public Prosecutor.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—In this case there was a complaint to the Police by the Respondents that their right of way was obstructed by the appellants. The Sub-Divisional Magistrate came to the conclusion that there was a dispute likely to cause a breach of the peace, and directed the parties to put in their statements. Then he went to the locality and after inspecting the disputed pathway directed the Sub-Magistrate to make a local enquiry to record evidence and to report to him under section 148 of the Code of Criminal Procedure. Witnesses were summoned by the parties for examination before the Sub-Divisional Magistrate. It was apparently agreed by both parties that these witnesses might be examined by the Sub-Magistrate. It is clear that no objection was taken to the examination of the witnesses by the Sub-Magistrate. The latter examined 7 witnesses for the petitioners, 4 for the counter-petitioner and a court witness, and sent in his report. The report was read in evidence before the Sub-Divisional Magistrate and arguments were addressed by the pleaders on both sides. Finally, the Sub-Divisional Magistrate came to the conclusion that there was a pathway which had been obstructed by the appellants, and directed that the appellants should not disturb the respondent in the enjoyment of that path until a decision was come to thereon by the Civil Court. Against this order, a petition was presented to this Court and was heard by Mr. Justice Spencer. The learned Judge came to the conclusion that there was no irregularity in the conduct of the proceedings by the Sub-Divisional Magistrate and dismissed the petition. This Letters Patent appeal is against the order of the learned Judge.

Mr. Srinivasagopalachariar contended that it was not competent to the Sub-Divisional Magistrate to delegate the examination of the witnesses to his subordinates. It is true that S. 148 of the Code of Criminal Procedure only authorises the Sub-Divisional Magistrate to depute his Subordinate to make a

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local enquiry. The question as to what exactly is connoted by the term "local enquiry" has not been laid down in any decided case. "Local inspection" may perhaps imply that no witnesses are to be examined at the spot. But the expression "local enquiry" is not necessarily inconsistent with the idea that the witnesses are to be examined in connection with the enquiry. The term "enquiry" itself is defined by S. 4 clause (k) whch says "it includes every enquiry other than a trial conducted by a Magistrate or Court". As at present advised, I am not satisfied that a person making a local enquiry is not competent to examine witnesses.

The further question is, supposing it was competent to the Sub-Mgistrate to examine the witnesses, whether the evidence taken by him can be used by the Sub-Divisional Magistrate for passing his order). Clause 2 of S. 148 says that the report of the officer so deputed may be read as evidence in the case. It did not say that the evidence taken at the enquiry shall be part of the record in the case, and can be relied upon for his order by the Sub-Divisional Magistrate. It is therefore doubtful whether the procedure adopted by the Sub-Divisional Magistrate in basing his conclusion upon the evidence taken by the Sub-Magistrate is regular. The learned Advocate relied upon the decision of Mr. Justice Wallis, (as he then was), in *Arumuga Govindan v. Venkatasubbier* [1], for the position that where a first class Magistrate acts upon the evidence taken by a Sub-Magistrate the former must be deemed to have acted without jurisdiction. I am inclined to take the same view. I have already held in Crl. R. C. No. 661 of 1916 that where there is no legal evidence upon which a conclusion can be based, the Magistrate must be deemed to have acted without jurisdiction. But there is nothing in the records before us to suggest that the Sub-Divisional Magistrate refused to hear any evidence which was tendered before him. Apparently in the case disposed of by Mr. Justice Wallis, the Magistrate refused to hear the evidence which he was asked to receive. The reference at the end of the judgment to cross examination on the depositions given before the Sub-Magistrate does not show that objection was not taken to the procedure by the party affected by it. I think that this defect or irregularity in the procedure is cured by S. 537 of the Code of Criminal Procedure. As pointed out by Mr. Justice Subramania

1. (1907) I.L.R. 31 M. 82.

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Aiyar in *Kadir Batcha* v. *Kadir Batcha Rowther*[1] a mere technical irregularity should not be allowed to affect the proceedings unless the party has been prejudiced thereby. In this case, the parties were apparently willing that the Sub-Magistrate should examine the witnesses. They took no objection to the procedure before the Sub-Divisional Magistrate, examined witnesses before him and were content to have his decision upon the materials placed before the Sub-Magistrate. It is clear to my mind that there has been no prejudice to the appellants by the procedure adopted by the Sub-Divisional Magistrate. The learned Judge Mr. Justice Spencer, was asked to exercise his powers of revision under the Government of India Act, S. 107 and he came to the conclusion that there was no irregularity. In Letters Patent Appeal, we should not interfere with that order unless we are satisfied that the party has been prejudiced by the order of the Sub-Magistrate.

On the second point as to whether the enquiry started at the instance of the respondent was within three months of the last exercise of the right of way, I am clear that we should not allow this objection to be argued in this Court, because if it had been raised before the Sub-Divisional Magitrate, the respondent would have been in a position to say that when he filed the petition, more than three months had not elapsed from the date of his exercising the right of way.

For these reasons, I am of opinion that the order of the learned Judge is right and that this appeal should be dismissed.

C. A. S.

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1. (1905) I. L. R. 29 M. 237.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE NAPIER.

A. S. N. Naina Pillai Marakayar ... *Appellant * in A. S. No. 248 of 1914 (1st Defendant.)*

v.

T. A. R. A. R. M. Ramanathan Chettiar and others ... *Respondents in A. S. No. 248 of 1914 (Plaintiffs 1, 2, 4, 5, and Defendant 2.)*

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Landlord and Tenant—Inam granted in favour of a temple—Cultivating tenants—Occupancy right—Evidence necessary to establish—Presumption of permanent tenancy from conduct of landlord—Debutter *property—Terms of tenancy defined by "muchilika," effect of—Meaning of the terms, "rokkakuthagai," "tharam faisal," "kudivaram," "miras," "kudimiras," "ullur purakudis," "pannai," "olavadai miras," "olavadai kudimiras" and "kasavargam"—Evidence Act, Ss. 90 and 114—Ancient document—Unsigned cadjan accounts—Presumption as to—Transfer of Property Act, S. 51—Transferee from tenant* bonafide *claiming occupancy rights—No right to compensation for improvements.*

The village of M. in the Tanjore District had been granted as an inam by the Rajah of Tanjore to a temple of which the plaintiffs were the trustees. More than 200 years ago the lands in the village (most of them uncultivated) were held by the temple on what was known as the "rokka kuthagai" tenure. The management of the temple and its properties passed into the hands of the Collector of the District as representative of the East India Co., in 1806. In the Collector's register prepared in 1809, the extent of cultivable *nanjah* and *punjah* land in the village was given roughly as 80½ *velis* and the temple was entered as the owner of these as well as the remaining waste lands. From the *paimash* accounts it appeared that about the year 1820, the extent of cultivated area in the village was 93 *velis* and that at least in 21 *velis* of wet land the temple owned both the *kudivaram* and the *melvaram* interest and was cultivating the same with its own *pannai-purakudis* (farm-servants.) As regards lands not directly under *pannai* cultivation, the profits due to the temple were collected from the tenants in the shape of a share of the produce. From 1820 to 1830 the Collector of the District as Manager of the temple let the temple lands for cultivation to the highest bidders, on short terms of 3 to 5 years. In 1831, the then Collector introduced the "Tharam Faisal Muchilika system" under which the temple lands were leased out for an indefinite term to the predecessors-in-title of the defendants at an annual paddy rent fixed on the then cultivable area with provisions for the commutation of such paddy rent into its money value and for the payment of additional rents for cultivation of excess area or of waste lands. The *muchilika* had been executed to the Collector by nine of the principal Karaigar cultivators of M. village, acting as the representatives of the Ullur Karayedu cultivators. In 1847 the plaintiffs predecessors-in-office took over the management of the temple and its properties and executed a *muchilika* to the Collector whereby they agreed among other things, not to violate or encroach upon the customary rights of "the purakkudies of the said sarvamanyam village."

From the year 1867 the defendants or their predecessors-in-title had been mortgaging and selling the lands in their holdings to the knowledge of the temple

* A. S. Nos. 248 of 1914 and Nos. 115 and 116 of 15. 22nd December, 1916.

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trustees and in the rent receipts granted to them as well as in some pymash accounts the former had been described as "kudimirasdars." In the year 1913, the trustees of the temple sued to eject the defendants after serving them with proper notices to quit.

Held that, in the circumstances of the case, and having regard to the *muchilika* executed by their predecessors-in-title in the year 1831, the defendants had no occupancy rights in the lands in their possession but were merely holding them under a yearly tenancy and that they were liable to be ejected.

Chockalinga Pillai v. *Vythilinga Pandara Sannadhi* [1], *Thyagaraja* v. *Gyana Sammandha Pandara Sannadhi* [2], *Chidambara Pillai* v. *Thiruvengadathiengar* [3]; *Mayandi Chettiar* v. *Chokalinga Pillai* [4], relied on.

Held further, that the presumption of a permanent tenancy ordinarily arising from the acquiescence and conduct of the landlord, had no application to the present case, first because, the lands in question being *debutter* it was beyond the legal competence of the trustees to grant a permanent lease thereof except for the necessities or clear benefit of the temple, and secondly because there was an instrument defining the terms of the tenancy as between the parties.

Satya Sri v. *Kantik* [5], *Sevatha Muthu Asari* v. *Rev. Mesquita* [6], referred to.

Meaning of the terms, "rokka kuthagai," "tharam faisal," "kudivaram" "miras," "kudimiras" "ullur, purakudis" "pannai," "olavadai miras," "olavadai kudimiras" and "kasavargam," explained.

Neither S. 90 nor S. 114 of the Evidence Act enables the Court to presume that unsigned accounts more than a century old, which do not purport to be in the handwriting of any particular person or persons, were written by persons having authority in that behalf.

Sheo Nandan Ahir v. *Ram Logan Singh* [7], *Krishna Pal* v. *Jagat Kishore Acharya Chowdhury* [8], *Uggrakant Chowdhry* v. *Hurro Chunder Sheokdar* [9], referred to.

A transferee of lands from a tenant who *bona-fide* believed himself to be entitled to occupancy rights therein is not entitled to compensation for improvements on ejectment by the landlord.

Narasayya v. *Raja of Venkatagiri* [10], referred to.

Appeals against the decree of the Court of the Temporary Subordinate Judge of Tanjore in O. S. Nos. 40, 42 and 61 of 1913, respectively.

The suits out of which these appeals arose were brought in ejectment by five of the six trustees of a temple known as Sri Manthra Puriswara Swami or Buddhi Pradeswara Swami temple near Muthupet in the Tanjore District. The facts material to the report are thus stated in the judgment of Sadasiva Aiyar, J. :—

1. (1871) 6 M. H. C. R. 164.
2. (1887) I. L. R. 11 M. 77.
3. (1887) 7 M. L. J. 1.
4. (1904) I. L. R. 27 M. 291.
5. (1912) 15 C. L. J. 227.
6. (1913) 24 M. L. J. 642.
7. (1915) 13 A. L. J. 921.
8. (1915) 20 C. W. N. 643.
9. (1880) I. L. R. 6 C. 209.
10. (1910) I. L. R. 37 M. 1.

"The plaintiffs relied in support of their claim, not only on the ancient Government records C and C-1 but also on the document (Ex. A). This latter document is a muchilika which was executed in August 1831 by the nine principal Karaigar cultivators of the plaint Mangal village acting as representatives of the Ullur Karayedu cultivators. The 5th issue framed in the suits relates to this muchilika. That issue as framed in O. S. No. 40/13 is as follows:—"Is the muchilika of 1831 genuine and binding on the 1st defendant or his predecessors in title; if so, are the plaintiffs entitled by virtue of the muchilika to eject the 1st defendant from the plaint properties". So far as the genuineness of the muchilika is concerned, no question was raised in the lower Court at the trial of the suits. (See also paragraph 6 of the 1st defendant's written statement which indicates that the genuineness of the muchilika was not seriously intended to be called in question even from the beginning.) Its genuineness was not disputed before us. It is a document more than 30 years old and it was executed in favour of the District Collector who as agent of the East India Company, was the Manager of the plaint Hindu temple and other Hindu public temples in the Tanjore District between 1806 and 1847. He became the agent of the Board of Revenue in 1817 under Regulation 7 of 1817 which vested the superintendence of such temples in the Board. The document comes from proper custody the Collector having handed over charge of all the affairs of the temple to two Hindu trustees in 1847. (See Ex. A-2). This document Ex. A was obtained by the Tahsildar from the nine executants and was sent to the Collector along with the Tahsildar's report (Ex. P) which expressly refers to Ex. A.

7. This muchilika (Ex. A) of August 1831 was preceded by a document (Ex. L) dated July 1831 which is an agreement executed between all the village Karaigar cultivators. The genuineness of this ancient document, (Ex. L.) also cannot be reasonably called in question. (See as to its production from proper custody (P. W. 7). Ex. L was clearly executed in anticipation of the Karaigars being able to obtain the tharam faisal lease of the cultivable lands in the village from the Collector. Ex. L. makes provision for the following matters: (1) the manner in which the Karayeedu tenants are to divide the village lands (to be so obtained from the Collector) for purposes of cutivation ; (2) the mode of paying the

sircar assessment and the swamibogham due to the temple; (3) the collection of rents from purakkudies who do not belong to the *karai* and who might cultivate some of the village lands as sub-lessees of the karaigar lessees; (4) the disposition of all the income and expenditure connected with the lands and (5) the division of the net assets realised from the lands in faslies 1241 and 1242 (July 1831 to June 1832 and July 1832 to June 1833).

"It is well-known that in the Tanjore District, the Collector Mr. Kinderseley, introduced during the decade 1831 to 1840, in respect of the temple lands under his management what is called the Tharam Faisal Muchilika system under which lands were leased for cultivation at an annual paddy rent fixed on the then cultivable extent with provision for the commutation of such paddy rent into its money value, the leases containing other characteristic terms and conditions. In the plaint village, before this Tharam Faisal Muchilika Ex. A was obtained in 1831, what was known as the "Proposal" Ijara lease system prevailed during the 11 years 1820 to 1830. In the still earlier period, that is, before 1820, the profits (from the lands) due to the temple were, as regards lands not directly under the temple Pannai Farm cultivation, collected from the cultivating tenants in the shape of a share of the gross grain out-turn as regards grain-growing lands (50% being the land-holders' share of the produce from Nanja lands and 40 from Punja lands). Under the "proposal system" (1820 to 1830) the lands were let for cultivation to that "proposal" lessee who offered the highest rent, each letting being for a very short term of 3 to 5 years. (See Exs. A1, A3, A4 & A5, which are documents executed to Government in connection with these "proposal" leases between 1820 and 1830). Under the Tharam Faisal Muchilika system introduced in 1831, the lessees held for an indefinite term paying an annual money rent calculated at a fixed commutation value as regards paddy rent. For excess area cultivated in a particular year, for waste lands brought under cultivation, for the raising of garden crops and so on, provisions are inserted for payment of additional rents. The lessees are also bound to supply labour on the occasions of the temple festivals and when repairs have to be done to the temple lands, channels etc. * * * The Muchilika Ex. A mentions about 67 velies of Nanja land and 16 velies of Punja land as granted for cultivation to its executants, total 83 velies (a veli being 6⅔ acres). It is clear from the ancient

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records (See Exs. C and C-1) that in the year 1723 or so, the extent of cultivable land was only 10 velies of Nanja and 15 velies of Punja, total 25 velies. It also appears from these records that the whole village was held on what was known in the Maharatta regimé as "Rokka Kuthagai" tenure more than 200 years ago, that the Maharatta King of Tanjore for some reason altered the original favourable Rokka-kuthagai tenure into the ordinary "Sanjayitha" or profit sharing tenure under which the Government obtained its assessment in the shape of a share of the grain produce, that the trustee of the temple complained about the year 1723 that this conversion of that favourable tenure into the ordinary tenure diminished the income of the temple to such an extent that it was unable to meet the expenses properly and that he prayed for the restoration of the original Rokka-kuthagai settlement tenure. The old favourable tenure was accordingly restored by the Rajah on the auspicious occasion of the solar eclipse in the Soorsan year 1124 (1723 A.D.) at the holy sea-side shrine of Vedaranyam, though the Rokka-kuthagai cash assessment was increased from 100 chakrams to 125 chakrams, (a chakram being equal to Re. 1-9-0). The old Rajahs used to give what is called Mohini allowance to the temples as pious gifts annually and the mohini allowance for this temple is 72 chakrams, which was deducted by the temple from the Rokka-kuthagai or cash assessment of 125 chakrams.

"As I said before, the original cultivation extent seems to have been only 25 velies though of course, the temple owned the entire lands in the village including waste, poromboke, house sites etc. In 1809, when the Collector prepared Register Ex. C, the extent actually found under cultivation was estimated according to the old rough measurement to be 31 and odd velies of Nanja and 43 and odd velies of Punja, about 80½ velies on the whole, and the temple is entered in the register as owner of these 80½ velies *besides the remaining waste lands* whose extent was estimated (again very roughly) at about 16½ velies. (See last clause of Col. 8 in Ex. C.). The Pymash measurement accounts, Exs. F (1816-17) and Ex. F-1 (1828-29) give the extent of the cultivated lands including topè as about 93 or 94 velies. The translation of the term "Rokka-kuthagai" in Ex. F, F-1, and other documents as "cash lease" found in the printed paper book is very misleading. As I said already, it is a technical revenue term used for a parti-

cular kind of revenue settlement made by the Tanjore Kingdom as regards some of the lands assessed to revenue. In the Tanjore District Manual, page 487, "Rokkakuthagai" is defined as "assessment" (that is, like shrotriam) "fixed on favourable rates either from favour or as an inducement to reclaim waste."

"The "proposal" Ijara documents between 1820 and 1831 and the Taram Faisal Muchilika Ex. A, also indicate that the cultivated area ranged in those years between 80 and 90 velies. It is well-known that owing to the internal political disturbances, waste lands in Mirasi districts like Tanjore and Chingleput which could have been cultivated so as to benefit both the Mirasidars and the Government were not, in the olden times brought under cultivation and that the Mirasidars were expected by the Government to settle cultivators in their villages as permanent residents for bringing lands under cultivation and even to induce residents of other villages to migrate during the cultivation season temporarily, the former class of cultivators becoming Ullur Purakkudies and the latter continuing to be Asalur Purakkudies. The "proposal" lessees were eventually unable to extend the area of cultivation so as to benefit the temple which was being managed by the Collector. The Taram Faisal Muchilika system, was then introduced and it has resulted in the cultivated area being increased to 140 velies, there being practically now no waste area to be brought under cultivation.

10. It was admitted on behalf of the appellants (and it could not be well denied as the very portions of Ex. F-1 on which the appellants relied disclosed the fact) that at least in 21 velies out of 64 velies of wet land cultivated before 1820, the plaint temple owned both the Melwaram and Kudiwaram interest and was cultivating that area with the temple's own farm or pannaiparakkudi servants and its own ploughs. (See description of Pymash Nos. 387, 388, 521, 524, 535, 537, 538 and 527 in Ex. F-1). It was, however, found by the Collector that it was convenient to have even these 21 velies let out to the Taram Faisal Muchilika lessees and to have the direct Pannai cultivation discontinued altogether. The appellants are unable to explain how the temple came to own the Kudivaram in the 21 velies or in only 21 velies. It is also significant that when a small area of waste land in the village was acquired by the Government in 1883 under the Land Acquisition Act, no person other than the

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temple claimed or was awarded any part of the compensation value, the whole being paid to the temple (See Ex. E.) The appellants' learned Vakil contended that the undertaking, Ex. A2, given in 1847 by two respectable Hindus to the Collector indicated that the cultivating lessees of the temple lands owned permanent occupancy rights. It is a matter of well-known history that the East India Company about the year 1840 directed the Board of Revenue and the Collectors to give up the management of the Hindu temples under their control. According to such directions, the Collector of Tanjore between 1847 and 1857 transferred the temples under him to Hindu trustees who gave undertakings like Ex. A 2 to him. The 7th clause of Ex. A2 on which the appellant's learned Vakil relies is as follows:— "In regard to the Purakkudies of the said Sarvamanyam villages, we shall, following the custom in vogue in each village and the custom in the Samasthanam acquit ourselves properly as had been hitherto done following the custom or practice, without violating or encroaching upon their rights." Now, "Purakkudies" as such have no occupancy rights and this vague clause in a document to which the Purakkudi tenants were no parties cannot confer any rights upon them. The 11th issue, namely, "Are plaintiffs disentitled to eject 1st defendant by reason of the Muchilika of 1847 executed to Government," was therefore rightly decided by the Subordinate Judge against the appellants.

T. R. Ramachandra Aiyar and *S. Muthia Mudaliar* for the Appellants.

T. Rangachariar and *S. Varadachariar* for the Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.*;—These three appeals have arisen out of three suits brought by the same plaintiffs. The suits were tried together and were disposed of by the Temporary Subordinate Court of Tanjore in the plaintiffs' favour by one and the same judgment. A. S. No. 248 of 1914 was filed directly in the High Court. The other two appeals were filed in the Tanjore District Court and were transferred to this Court to be heard along with A. S. No. 248 of 1914.

[After setting out the main facts of the case as above extracted, the judgment proceeds.]

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I think that the defendants who claim as alienees and representatives of the original tenants of the temple during the time of its management by the Collector are clearly bound by the terms of Ex. A executed by their predecessors-in-title and that the learned Subordinate Judge has dealt with Ex. A and the other evidence in the case in a very careful, well-considered and exhaustive judgment. Notwithstanding the long and elaborate arguments advanced by the appellant's learned Vakils before us, they have failed to show that the statements in that judgment as to the contents and construction of the documentary and other evidence discloses any material inaccuracies. The only error of importance pointed out is that the Lower Court relied on the cadjan accounts, Ex. M series which are contended to be inadmissible in evidence. These accounts purport to relate to the incomes derived from the plaint village lands by the temple between 1712 and 1823 and to the expenditures incurred out of that income. If these documents are admissible in evidence, they almost conclusively establish the plaintiffs' case on the first issue. The documents, however, are not signed by any person and do not purport to be in the handwriting of any person. Sec. 90 of the Evidence Act says "Where any document purporting or proved to be 30 years old, is produced from any custody which the Court in any particular case considers proper, the Court may presume that the *signature* and every other part of such document which purports to be *in the handwriting of any particular person is in that person's handwriting* and, in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to be executed and attested." I do not think that this section enables the Court to presume that unsigned accounts which do not purport to be in the handwriting of any particular person or persons were written by the authorised accountants of the temple to which the accounts purport to relate. I at first thought that Sec. 114 of the Evidence Act might enable the Court to presume, "regard being had to the common course of natural events", that these elaborate accounts were really written by accountants employed by the trustee of the temple. But on further consideration, and having regard to the decisions in *Sheo Nandan Ahir* v. *Ram Logan Singh* [1]; *Kashinath Pal* v. *Jagat Kishore Acharya Chowdry* [2], *Ubilack Rai* v.

1. (1915) 13 A. L. J. 921. 2. (1915) 20 C. W. N. 648.

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Dallal Rai [1], and *Uggrakant Chowdhry* v. *Hurro Chunder Sheokdar* [2] (see also *Re Airey* v. *Stapleton* [3],) as to the limits of the presumption permitted to be raised by section 90 of the Evidence Act) I do not think that I would be justified in doing so. Vague expressions are used in some decisions to the effect that a document more than 30 years old and coming from proper custody might be "presumed to be genuine". The use of such vague language (instead of following the words of the section which deal with the signature, handwriting, execution and attestation found in such documents and purporting to be those of particular persons) is likely to lead to confusion of thought and to the Court raising presumptions as to the existence of facts not within the scope of Sec. 90. I would therefore exclude Ex. M. series altogether from consideration as evidence in this case.

* * * *

In paragraph 46 of his judgment, the learned Subordinate Judge sums up his conclusions on the principal issues. Omitting the reference to Exs. B., M. series and G. I shall quote the greater portion of the paragraph (with a few alterations at the end) as it expresses fairly and fully my own conclusions on the evidence. "In the present case, the reference to the whole of the village in Ex. C as that which was granted to the temple, the recital in column 8 in Ex. C that the temple actually enjoyed the whole of the village including the poramboke, the payment of compensation to the temple, vide Ex. E, the grant of a land to a gurukkal by the temple, vide entry in Ex. B, the entry in the Collector's register Ex. D that Manthrapuriswarswami is the Mirasidar, the last word denoting in the District of Tanjore that he is the proprietor of the soil, the reference in Ex. F to Manthrapuriswaraswami as Miras solely entitled to the enjoyment of the village, the recital in Ex. J, 10 of 1815 that the village is Ekabogagramam, the recital in Ex. A5 that Mangal village belongs to the temple, the reference in the lease deeds executed to the Collector before 1831 to the *cultivation* being undertaken by the lessees, the reference to the temple as the owner and the village as Miras of Ekabogam Manthrapuriswaraswami in Ex. F1,......the reference in Exhibits II series from 1891 to 1899 to Manthrapuriswaraswami as Miras Manthrapuriswami, the collection of fishery rent, tope rent and

1. (1878) I. L. R. 3 C. 557. 2. (1880) I. L. R. 6 C. 209.
3. (1897) 1 Ch. 164.

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house site rent by the temple, the admitted ownership of the temple of some pannai lands as conclusively proved by Ex. F1 and L among others......the reference to the same tenants by more than one name such as Olavadai Kudimiras and Purakkudi, Ullur or Asalur, in the Pymash, the reference to these men as Purakkudis in the Tashildar's report Ex. P. the lease of the entire Mangal to certain persons by the Collector, for the cultivation of lands from faslis 1230 to 1240, *the execution of Ex. A by certain persons for the cultivation of lands without any reference to their Kudikani right in it and with a stipulation for payment of Swamibogam to the temple and Rokkakuthagai to Government so long as they are in possession of the lands,* the absence of all mention of Kudikani right in the Muchilika executed by the trustees to the Collector and the provision made in Ex. A for the supply of labour to the temple festivals and for payment of such tirvai as is fixed by Government in respect of the special crops raised and in respect of poramboke waste land etc., suggest the inference that the temple was entitled to both the kudivaram and melwaram rather than that the tenants had kudikani rights. Not a single document has been produced by defendants to show or to suggest that the temple was not "the owner of" both melwaram and the kudivaram right in the village ... ... In my opinion plaintiffs have proved by means of documents and course of dealings evidenced by documents that it is more likely that the temple was "the owner" of the entire village and was both the melwaramdar and kudivaramdar than that it had only the melwaram right". I might add that the accounts J series ranging between 1806 and 1840 are themselves sufficient to prove the plaintiffs' contention. For instance, Ex. J—74 shows that the "proposal" lessee himself realised the proceeds of the lands and gave out of the proceeds the Purakkudiwaram due to the cultivating tenants.

As against this, the appellants relied on what strikes my mind as inconclusive and one-sided transactions and on some weak suggestions. One of the arguments advanced was that Rokkakuthagai tenure being a tenure on favourable terms as to assessment, the temple was only an Inamdar, that the grant of an "Inam" is presumably only the grant of the Government assessment (either a portion or the whole) and not of the kudivaram, and that the burden of proving that the temple also owned the kudivaram was upon the plaintiffs. As regards the burden of proof in such cases,

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I was a party to some decisions beginning in 1912 in which it was held that the burden of proving that an inamdar was the owner of the kudivaram at the time of the grant of the inam to him, lay upon the inamdar, but my view (which differed from an earlier decision in 1910) has not been accepted in some later decisions of this Court which have held that as the jurisdiction of Civil Courts would be ousted if the inamdar was presumed not to have been the owner of the kudivaram (and if the village is accordingly held to be an estate under S. 3 clause 2 (d) of the Estates Land Act) the persons so seeking to oust the jurisdiction of the Civil Courts by alleging that the inamdar was not the Kudivaramdar at the time of the inam grant ought to prove his said allegation. See *Ramalapati Papia Reddi v. Nanduru Peda Venkatacharyulu* [1]. The learned Subordinate Judge (evidently following my view) threw the burden in this case on the plaintiffs of proving that the temple was the owner of the kudivaram right from the beginning, and even so, found that the plaintiffs have proved their case. Without going to the question of burden of proof I am clearly satisfied that the evidence in this case very clearly establishes the plaintiff's contentions. In an Inam village in which there are no tenants having occupancy rights and of which the Inamdar is also the Mirasidar, the full ownership right is in the inamdar and the distinction between melwaram right and kudivaram right is of no utility. (The word 'kudiwaram' has got several meanings. Its literal significance is the share of the cultivator in the produce raised. In that sense, the kudivaram belongs to the cultivating tenant, whether he has got a right of permanent occupancy in the land or is a lessee for only one year, or is a lessee from year to year or for a fixed term or is even a mere tenant at will. Kudivaram is also used in the sense of the *right* of such a tenant of whatever kind in the land so long as he continues in possession of the land. Finally it is also used to mean the right of a tenant *having a permanent occupancy tenure in the land in his holding.* In this last sense, it is called also mirasdari right and sometimes kudimiras right. See *Chennan* v. *Kondam Naidu* [2]. where Spencer, J., deals with the meaning of the *Kudimiras.* That decision also establishes that a Mirasidar who gets a Shrotriem inam grant from the Government does not lose thereby his original kudivaram right in the lands and *might be called both a Mirasidar and an Inamdar*).

1. (1914) M. W. N. 794. 2. (1913) 26 M. L. J. 169.

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The appellants further relied on the fact that since about 1867, they and their predecessors in title have been hypothecating, mortgaging and selling the lands in their respective holdings to the knowledge of the temple trustees and of the temple officials and that they have been granted rent receipts describing them as *Kudimirasidars*. The documents filed on the defendants' side and dated earlier than 1867, namely Exs. 75, 76, 77 III (A) and III (B) are easily manufactured cadjans and I agree with the Subordinate Judge that their genuineness should not be presumed). The temple trustees and the Kanakkans were, however, themselves interested in some of the village lands as cultivators or as alienees from cultivators and their conduct is not of much value as against the temple. No doubt, where a landlord is legally entitled to grant rights as against him to a tenant he can, by acquiescence or by conduct amounting to estoppel, be treated as having made such grant. But the trustees of a temple have no legal right or power to confer higher rights on a temple-tenant in the temple lands in his holding than he originally possessed except for the necessities or the clear benefit of the temple. The acquiescence and conduct of the trustees cannot therefore affect detrimentally the rights of the temple. In *Satya Sri* v. *Kartik* [1], Jenkins C. J., says "The presumption in favour of a permanent tenancy implies that there is ground for inferring that the tenure was always intended to be and always was hereditary, or that it acquired that character by subsequent grant. *But a presumption in favour of a transaction assumes its regularity*: it cannot be made in favour of that which offends legal principle. It is this that prevents our accepting the view of the lower Appellate Court as final, for it would seem that the property to which the presumption has been applied is *debutter*."

"If it was *debutter* at the time the tenancy originated, then this would affect the applicability of the presumption for, to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment, the benefit of an augmentation of variable rent from time to time would be a breach of duty in a *shebait* and is not therefore presumable: *Maharanee Shibessouree Debia* v. *Mothoora Nath Acharjo* [2]". No provision of that branch of the law which relates to limitation or prescription has been pointed out to us which could confer such enhanced right on a

1. (1912) 15 C. L. J. 227. 2. (1869) 13 M. I. A. 270, (275).

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temple tenant (whose rights were in the first instance defined by the terms of a document conferring on him lesser rights) by reason of the conduct of the trustees of the temple. That the allegation in many of these transfer documents filed on the defendants' side, namely that the alienors owned occupancy rights, was in all probability, not *bona fide* is shown by the fact that not only waste lands of the temple subsequently brought under cultivation but even lands admitted to have been under the direct pannai cultivation of the temple originally have been alienated with such false recitals.

Another argument of the appellants was that in the Pymash account Ex.F1,9 Kudimiras Karaigars are mentioned and the temple itself is also called an additional Kudimirasidar and Karaigar. These Pymash accounts are first prepared by the lower revenue officer and surveyors, (Vattam Karnam Assistants, Mujumdars and so on) and then there is a revision or check by a higher officer called Brigedar. In the pymash Ex. F of 1816-17, the word 'miras' occurs only as regards residential sites with their appurtenant backyards called 'manaikkollai', and even as regards these 'manaikkollais' only 16 out of 21 are stated to belong to certain cultivators with mirasi right, the remaining 5 belonging to Kasavargam tenants, that is, tenants newly introduced into the village by the temple Mirasidar for cultivation purposes on condition that they would give up their dwelling sites to the Mirasidar when they ceased to do cultivation work for him. Ullur purakkudies (as distinguished from Asalur Purakkudies and Kasavargam tenants) usually have permanent *residential* rights in the village and the word 'miras' which in its widest sense means proprietory right (and is used to denote even hereditary right in temple offices) may without impropriety be used to describe the rights of these Ullur purakkudies in their residential sites and they might be called Kudimirasdars of such sites. The reference in Ex.F-1 to the temple as one of the Kudimirasidars seems to be almost meaningless, except in this sense of a permanent resident. The temple is the landlord and landowner and is described in ancient documents as the full Ekabogam (exclusive right) Rokkakuthagai Mirasidar of the entire village and in Ex. F-1 also it is so described in several places. If it is only one of several Kudimirasidars, it cannot be called Ekabogam Mirasidar, and would be only one of several Palabhogam Mirasidars. It is further significant that out of the 9persons described as Kudimirasidars in the

beginning of Ex. F-1; the mark of one man alone appears against his designation as Kudimiras Ammayappa Thevan, while the marks or signatures of others describe them as either Olavadai or Ulavadai miras. Again in another portion of Ex. F-1 where a count of all the ploughs in the village is made, all these persons are called Ullur Purakkudies, while the temple alone is called Rokkakuthagai Mirasidar. Lastly, when the Ajmash or check measurement was made by the Brigedar on these Pymash accounts (he seems to have checked about 44 entries), the descriptions of at least some of those persons who were entered as Kudimiras cultivators in the checked entries in the preliminary Paimash were, in pursuance of a Huzur order, corrected into Ulavadai miras which description does not, of course, imply any occupancy right. As pointed out by the Lower Court in paragraphs 97 to 99 of its judgment, the cultivating tenants under the temple (which is the Ekabogham miras proprietor of this village) seem to have signed or put their marks (many of them being marksmen whose marks or names were entered for them by some unknown person) in these Pymash accounts describing themselves indiscriminately and variously even in the course of the same document as Olavadai, Olavadai Miras, Olavadai Kudimiras, Ullur Olavadai, Ullur purakkudi and so on. Not much importance therefore could be attached to these varying descriptions. It was not formerly to the interests of the temple to disturb these persons, though they have been only cultivators from fasli to fasli. That such cultivators should in their own estimation and owing to their not being disturbed for long, try to raise themselves by making unilateral declarations is not unnatural. From being Pannai cultivating servants or Asalur purakkudies, they become Ullur purakkudies and begin to call themselves Olavadai tenants, Olavadai Miras, Olavadai Kudimiras and even occasionally Kudimiras.

Of the several executants of Ex. A, who were allowed (probably by an oversight in the Collector's office) in the beginning of the document to style themselves Kudimiras, only one ventured to sign it as such. Under all the circumstances of this case, too much importance should not be attached to this fact, especially as in the Arzee Ex. P sent by the Tahsildar to the Collector along with Ex. A, he calls them only kudis or cultivators and even the man Iyya Pillay who signed as Kudimiras is called in Ex. P, only Purakkudimiras. Further the terms in the body of Ex. A are

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wholly inconsistent with any right of permanent occupancy in the executants. The word "Swamibogam" used in Exs. A, F, F-1, and other documents has got a settled meaning in the Tanjore and Chingleput Districts). Wilson in his Glossary says *"Swamibhogam in the Tamil country means the share of the produce or rent which is paid to the Mirasidar or hereditary proprietor by the tenant cultivator holding the land in farm for a fixed period"*. I think the use of the word Swamibogham in Ex. A, is almost conclusive as to the full proprietorship of both the melwaram and kudivaram rights in the temple.

Lastly, it seems to me that the principal questions raised in this case have been in a manner settled in the plaintiffs' favour by the decisions of this Court and of the Privy Council given in similar cases which had arisen in the same Tanjore District. I shall refer only to four of these decisions. In *Chockalingam Pillai* v. *Vythilinga Pandara Sannadhi* [1] the plaintiff as trustee of the Piruppalur Sriyajneshwaraswamy Muttam sued to recover covil or temple lands which were leased to the defendants under a deed of agreement, Ex.A, dated 14th August 1837, entered into between the defendants and the Government who at that time held the management of the pagoda property. The suit was brought in 1868. Defendants set up a perpetual right of occupancy, one of the grounds being that for 30 years they had paid Swamibhogam money at a fixed annual rate. The material terms in the Taram Faisal Muchilika Ex. A, in that case were very similar to the terms of the Taram Faisal Muchilika Ex. A in this case. It was held that the tenancy continued to be regulated by the agreement Ex. A, which created only a tenancy from fasli to fasli and that mere long enjoyment cannot alter the nature of the tenure. In *Thyagaraja* v. *Gyana Sammandha Pandara Sannadhi* [2], the tenants executed a Muchilika for the lands in the village of Sandaputtur belonging to a Hindu temple, the Muchilika having been executed in 1830 to the Government who was then managing the temple lands through the Collector. The Collector handed over the management to a Hindu trustee in 1857 on the latter's giving an undertaking to the Collector not to eject the ryots so long as they paid cist. To this undertaking, the ryots were of course no parties. The ryots set up the right of occupancy and also the trustees' undertaking

1. (1871) 6 M. H. C. R. 164.

2. (1887) I. L.R. 11 M. 77.

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of 1857 as a defence to the suit. The learned Judges followed 6 M. H. C. R. 164 and held that the tenants had acquired no right of occupancy though the consolidated rent fixed by the muchilika of 1830 had been paid separately by the several persons who claimed under the original tenant of 1830 and though there had been alienations by the tenants of their several holdings. Mr. Justice Brandt says in his judgment "Defendants rely very much on their possession of the lands by themselves, or by those under whom they claim from the 1st of January 1830, if not from a still earlier date. But mere length of tenure for any period will not give a right of permanent occupancy to a ryot, who has been let in as a tenant from year to year. It was admitted by Turner, C. J. in *Krishnaswami* v. *Varadaraja* [1] that the period of occupation which should confer upon the ryot a permanent tenure could only be settled by legislation." "The muchilika of 1st January, 1830 does not tend to show that the title of those who executed them was permanent. On the contrary, there are some expressions which favour a contrary supposition; and if there are some expressions which indicate an intention that the occupation should be for more than one fasli, they are (as Sir Colley Scotland said of similar expressions in a muchiilika in *Chockalingam Pillai's case*, [2] indefinite as to any period of time except that of the fasli, and clearly therefore did not bind the will of either party beyond the currency of each fasli while the tenancy remained undetermined. The defendants say that their tenancy was not created by this muchilika, but that it existed before that as a right of permanent occupancy. The defendants' predecessors in title may have been in possession before 1830. But if they had a permanent right of occupancy, they would probably have taken care to have that right expressly recognised in the muchilikas of 1830. At present the permanency of their title before 1830 has not been proved."

"In the muchilika executed in favour of Government by the plaintiff's predecessors on the 7th December 1857, he promised to respect the rights and privileges of the purakudies according to the customs of the respective villages, and of the country; and that, as long as they should pay the cist properly, he would not eject them. But he did not thereby admit that the ryots had any permanent right in the soil, or that the Swamibhogam

1. (1882) I. L. R, 5 M. 345, 357. 2. (1871) 6 M. H. C. R. 164, 168.

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was to be the same for all ages. The passage in question amounts to little more than an engagement to respect the rights of the ryots whatever those rights might be."

"In the result it appears to me that the defendants have not shown that they had any higher title than that of cultivating tenants from year to year". The whole of these remarks, it appears to me, applies to the present case also. The next case is that reported in *Chidambaram Pillai* v. *Thiruvengadathiyangar* [1] to which Mr. Justice Muthusami Aiyar who belonged to the Tanjore District) was a party. The plaintiffs there, were trustees of the Rajagopalaswami temple at Mannargudi in the Tanjore District. The defendants (tenants) paid the Government assessment to Government and the Swamibogham or Mirasbhogam to the temple trustees. On account of the Mohini allowance due by the temple, the revenue due on the village to the Government was shortly before suit assigned to the temple and this temple therefore became (in a sense) also an Inamdar. The tenants set up kudikani right, that is, permanent right of occupancy and relied upon a paimash account of 1839 and on the free alienations by the tenants of their holdings, the alienations having begun so long ago as in 1848. The learned Judges held that the entries in the paimash account are not conclusive, that the assertion in the sale deeds of kudikani rights by the tenants cannot bind the temple, that the karayeedu system (namely, periodic redistribution of lands among the ryots) having been obtaining in the village cannot also give a permanent right of occupancy to the tenants in the village that the undertaking given by the trustees to the Collector not to eject the tenants so long as they regularly paid the rent without mentioning that the ryots have any kudikani rights, cannot help the tenants and that the trustees were entitled to eject the tenants. At page 10 it is said " Seeing that the Officers of Government had managed the temple villages for many years prior to 1857, it is not improbable that the consideration shown by them to the purakudies as an incident of good management and the length of time for which the purakudies cultivated, inspired them with a belief that they were not liable to be ejected so long as they were punctual in the payment of rent. This may account for sales and mortgages by the appellants and their predecessors *accompanied with an assertion of kudikani right* which may loosely be used to indicate

1. (1887) 7 M. L J. 1.

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a permanent tenure of some kind or other." "The non-specification of lands in the leases, the fact that each of the appellants cultivated separately and that there was an occasional distribution of lands held by the Purakkudies are referable to the conventional mode of leasing to chief men among the purakudies leaving it to them to select others who are to cultivate with them and to distribute the portions to be cultivated by each as may be arranged between them." (In the Full Bench case in *Sevatha Muthu Asari* v. *Reu Mesquita* [1] it was expressly decided that where "there is an instrument defining the terms of the tenancy and it shows that there is no permanent tenancy "created under it, the facts of alienation and sub-letting by the tenants and even the fact that the original letting was a building lease cannot confer a permanent right of occupancy.)

The fourth and the last case I shall refer to is the important Privy Council decision reported in *Mayandi Chettiar* v. *Chokalinga Pillai* [2] their Lordships reversing by their said decision the decision of this Court reported in *Chokkalingam Pillai* v. *Mayandi Chettiar* [3]. In that case also, the tenants began to hold under a taram faisal muchilika which was executed in December 1831 and completed in January 1832. They claimed permanent occupancy right on grounds very similar to those advanced in the present case. The executants called themselves ulavadai mirasidars. They relied also on long enjoyment with a uniform rate of rent. Their Lordships point out that the description as ulavadai mirasidars "does not occur in any document emanating from the Collector's office but only in documents put forward by the applicants themselves" and their Lordships state "In the case of *Chokkalinga Pillai* v. *Vythilinga Pandara Sannadhi* [4], in which the circumstances were very similar to those of the present appeal, and there was a muchilika in similar terms, it was held that no permanent tenancy was created. "The language of the agreement", said Scotland, C. J. (page 168), "had, I think no greater effect than the ordinary form of muchilika given by a ryot in exchange for a pattah, except so far as it indicated the intention that its terms should apply to every successive fasli for which the holding might be continued by neither party exercising the right to terminate it at the

1. (1913) 24 M. L. J. 642 at p. 651. 2. (1904) I. L. R. 27 M. 291 et. sq.
3. (1896) I. L. R. 19 M 486. et. sq=6 M. L. J. 247.
4. (1871) 6 M. H. C. R. 164.

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end of a fasli." This decision was followed by the Madras High Court in the case of *Thiagaraja* v. *Gyana Sambandha Pandara Sannadhi* [1], in which the circumstances were almost identical and their Lordships see no reason to differ from the conclusions at which those learned Judges arrived, upon a state of facts which cannot be distinguished *in any material degree*, from those in the present suit." Thus their Lordships of the Privy Council expressly approved of the decisions in *Chockalinga Pillai* v. *Vythealinga Pandara* [2] and *Thiagaraja* v. *Gyana Sambandha Pandara* [1], in which it was held that lessees under taram faisal muchilikas executed to the Collector of Tanjore in the thirties of the last century could not claim permanent occupancy rights by mere length of possession.

I agree with the lower Court for the reasons already stated that the 1st defendant who evidently belongs to the trading class had no *bona fide* belief that his vendors had a permanent occupancy right in their holdings. It has been held in *Narasayya* v. *Rajah Venkatagiri* [3] that S. 51 of the Transfer of Property Act will not apply to the case of a tenant as it cannot be said that he is a person believing in good faith that he *is absolutely entitled* to the land. It therefore follows that even assuming that the 1st defendant *bona fide* believed that his vendor had occupancy rights he cannot claim compensation under S. 51 of the Transfer of Property Act. In the result I would dismiss the appeal with the costs of the respondents (plaintiffs).

Napier, J.:—I agree.

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1. (1887) I. L. R. 11 M. 77. 2. (1871) 6 M. H. C. R. 164.
3. (1910) I. L. R. 37 M. 1.

PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Allahabad.]

PRESENT:—VISCOUNT HALDANE, LORD ATKINSON, SIR JOHN EDGE AND MR. AMEER ALI.

Gobind Das ... *Plaintiff*—Appellant.*

v.

Bishambhar Das ... *Defendant—Respondent.*

P. C.

Gobind Das *v.* Bishambhar Das.

Libel—Caste dispute—Publication of resolution of caste Panchayat—Privilege—Whether destroyed by irregularity in passing resolution—Jurisdiction of Caste Panchayat—Whether subject to control of Civil Courts.

B, the Chowdhri or Chairman of a caste Panchayat, circulated to other members of the caste a resolution of the panchayat suspending social relations with G's family. In an action for libel brought by G against B, it was contended that G. had no proper notice of the meeting of the panchayat that in consequence the passing of the resolution was contrary to natural justice, and B was not privileged in publishing it.

Held, that B's privilege was not affected or rebutted by any defect in the notice to G. *Held also*, that notice was in fact duly given.

To defeat or rebut privilege, the law does not recognise anything short of actual or express malice in the publication of the matter which is charged to be libellous.

The question of the power of the Civil Courts to control the jurisdiction of caste bodies purporting to excommunicate or censure caste offenders was discussed but not decided.

Appeal from a decree of the Allahabad High Court (Tudball and Mahomed Rafiq, JJ.) dated March 16, 1914, reversing a decree of the Subordinate Judge of Benares.

The facts of the case sufficiently appear from their Lordships' judgment.

Sir H. Erle Richards, K. C., and *Dube* for Appellant submitted that the occasion was not privileged because the resolution was not passed regularly but contrary to natural justice, there being a neglect of the requirement that the accused should be present or be given an opportunity of being present. Alternatively, there is evidence of malice. It is true the defendant was agent of the panchayat, but if the principal is not privileged then the agent is not privileged.

Plaintiff had no notice of the meeting of the panchayat. At the meeting the members present knew that he was at Calcutta.

* 27th and 30th April, 1917.

P. C.

Gobind Das v. Bishambhar Das.

It is made a charge against him that he had not signed a certain *chittha*: he never had the chance of signing it. It is also charged that he did not attend the panchayat: how could he when he was at Calcutta and had no notice?

[*Lord Atkinson* referred to *Chamberlain* v. *Boyd* [1].]

[*Viscount Haldane* :—I should like the authority for the proposition that the Court has power to restrain a panchayat from excluding a man from caste. My difficulty is that what was said was true].

I concede that a domestic tribunal may outcaste a man, and may declare its decision to the members of the caste. Odgers, Law of Libel and Slander, 5th Edn. p. 287 (Chap. 10, Qualified Privilege) but I submit that if the outcasting itself is *invalid*, the declaration is not privileged. Caste meetings must observe the requirements of natural justice. *Krishnasami Chetty* v. *Virasami Chetty* [2]. When this was not done, a declaration that a man was outcasted was held to be illegal, and he was given damages for libel. *Vallabha* v. *Madusudanan* [3].

It would have been a complete answer in the latter case to say that the man was in fact outcasted: but it was decided that defendant could not rely upon that fact, because the outcasting was contrary to natural justice. That case was accepted as an authority in *Keshavlal* v. *Bai Girja* [4] where it was laid down that the right to outcaste must be properly exercised. That case recognises that if the decision to outcaste is improperly obtained, a statement of the outcasting is actionable. The rules of natural justice in these matters are summarised in Pollock on Torts, p. 125.

[*Viscount Haldane* :—Is not the right of the Court to interfere as to voluntary associations limited to cases where a right of property is involved?]

Under the conditions which prevail in India a man has such a right in the maintenance of his caste that the Court will take cognisance of the matter though no question of property is directly involved.

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1. (1883) 11 Q. B. D. 407.
2. (1886) I. L. R. 10 M. 133, 144.
3. (1889) I. L. R. 12 M. 495.
4. (1899) I. L. R. 24 B. 13, 21.

Cooppoosami Chetty v. *Duraisami Chetty* [1]; *Jagannath Churan* v. *Akali Dassia* [2], *Advocate-General of Bombay* v. *Haim Devakar* [3], *Appaya* v. *Padappa* [4], *Ram Kant* v. *Ram Lochum* [5].

The Courts in India regard the caste interest as of so great value that they specially protect it: and these cases show that they will intervene on behalf of those expelled from caste on grounds contrary to natural justice.

[*Viscount Haldane* asked *Dunne* whether he justified.]

[*Dunne*:—Their case throughout was that the panchayat was a bogus one: that was the issue. Both Courts have held that it was not.]

[*Viscount Haldane*:—It would have been much better if the English practice had been followed: innuendo, that plaintiff had been outcasted, plea of justification.]

The words of the resolution suggested that plaintiff had refused to accept a reasonable opportunity to appear and clear up his position.

[*Lord Atkinson*:—You are driven to say that such a publication would be untrue unless the expulsion were legal and valid.]

I present the case on the ground that the panchayat have no right to pronounce a decision contrary to natural justice. The issue as to notice, the High Court have found against me. I submit the Subordinate Judge was right in holding that the notice was not sufficient, and also that there was malice on the defendant's part in procuring the passing of the resolution.

The libel is a communication to the pachhaintar telling them to have no dealings with plaintiff. It is defamatory and actionable. The defence may be privilege, but that can only be if they have acted properly: the statement was not made honestly, in the sense that the plaintiff had no opportunity of appearing.

[*Lord Atkinson*:—There is nothing against natural justice in the publication. Your objection is to the way the decision was arrived at.]

Dube followed:—Both the Courts below have found the statements are defamatory. There is no analogy between a voluntary association, like a club, and a caste. Outcasting in

1. (1909) I. L. R. 33 M. 67.
2. (1893) I. L. R. 21 C. 463.
3. (1886) I. L. R. 11 B. 185.
4. (1898) I. L. R. 23 B. 122.
5. (1859) S. D. A. 536.

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India is far more than turning a man out of a club: many of a man's rights are affected by it. Hence to say a man is an outcaste is *per se* defamatory.

Whether there was privilege depends on two things:

(1) Had the panchayat jurisdiction?

(2) If they had, did they exercise it according to the rules of natural justice?

So far back as 1848 suits have been entertained for reinstatement to caste. In that year it was decided in express terms that a Mahomedan who had been improperly expelled should be restored to caste. *Soonanaoollah Khan's case* [1].

This was followed in 1859 in the case of a Hindu Brahmin, the acts charged against whom were not such as to justify expulsion. The Court went into the merits and held the man was entitled to reinstatement. *Ram Kant* v. *Ram Lochun* [2].

[*Viscount Haldane*:—Was the question of jurisdiction raised? No one seems to have thought of it.]

[*Mr. Ameer Ali*:—Was the suit here brought on those lines?]

No: it has been the custom in India to sue for defamation.

[*Viscount Haldane*:—You have some authority for saying that the Courts in India have dealt with cases on these lines: but how can the Courts here go into questions of this kind?]

The question is whether the panch had jurisdiction. The High Court held they had. I contend they had not.

[*Dunne*:—This issue of jurisdiction has never been raised before.]

It was because it was raised that the question of sea-voyage was gone into. The Courts should have framed an issue whether the ground alleged was one for which a man could be outcasted.

[*Lord Atkinson*:—To say the alleged cause was no adequate cause is making us a Court of appeal].

[*Dunne*:—It has never been suggested that the panch was not a perfectly proper tribunal to decide the point.]

The Civil Courts ought to consider whether what a member did involves loss of caste. You have to decide on evidence what the rules of the caste are. *Venkatachalapati* v. *Subbarayadu*, [3].

1. (1848) S. D. A. 541: 10 India Dec. O. S. 373.
2. (1859) S. D. A. 535, 536.
3. (1890) I. L. R. 13 M. 393.

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[Reference was also made to the Bengal Civil Courts Act, 1887, S. 37.]

A. M. Dunne,—Counsel for respondent was not called on.

Their Lordships' judgment was delivered (May 23, 1917) by

Mr. Ameer Ali:—This appeal arises out of an action for libel brought by the plaintiff in the Court of the Subordinate Judge of Benares, where the parties reside and carry on business. Both belong to the Agarwala Vaishya caste of Hindus, and both appear to occupy an influential position in their community.

The Agarwalas of Benares are divided into two *Tarsor* sections, one called the *Purbia* or "Eastern," the other *Pachhain* or "Western"; but in doctrinal matters and caste observances there seems to be no difference between them. The inter-communal government of each section is vested in a *Panchayat* composed of the general body of its members, which so far as appears on the record, has the authority to enforce the due observance of the caste rules. In this connection it should be mentioned that there are numbers of Agarwalas in the neighbouring towns of Mirzapore and Chunar with whom the Benares Agarwalas maintain close social relations.

The proceedings in this case show that many of the Agarwalas of Benares take a much stricter view of the doctrines of their religion than most of their fellow-castemen, especially in Western India; and in no respect is the difference more pronounced than on the question of a sea voyage undertaken by a Hindu. Whilst other Hindus, including Agarwalas, hold that a purification ceremony technically called *Prayaschitta* absolves the sin incurred by a voyage across the seas, the Benares Agarwala holds firmly to the doctrine that the taint the offender contracts is beyond absolution. In recent years, however, a strong body of public opinion has been growing up which considers this extreme view to be not only illiberal and opposed to the spirit of the times, but also as unwarranted by the *Shastras*. The plaintiff seems to be the protagonist of this school of thought. The controversy between what may be called for the purposes of this judgment the orthodox section, and the comparatively smaller body of reformers assumed an acute character with the return to India in May 1910 of one Babu Laksmi Chand, also an Agarwala belonging to the "Western" section. He appears to have been

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sent to England as a Government scholar, and to have had in this country a meritorious career. On his arrival, however, at home he was promptly put out of the caste by the *Panchayat* of his section. His academical distinctions in England were appreciated by the advanced and liberal-minded people of his community, who received him with marks of esteem and respect; and after he had gone through the *Prayaschitta* ceremony they gave a dinner in his honour, at which several of the younger members of the plaintiff's family are said to have been present. This seems to have offended the religious feelings of the orthodox; a *chittha*, or "declaration of faith," was drawn up, it is said, at the instance of the defendant (whose position in the *Panchayat* will be explained later on) and circulated for signature among the members of the caste. It is alleged by the defence, but denied by the plaintiff, that this document was presented to him, and that he declined to attach his name to it. On his side, he issued to his caste-people and others a public appeal, in which he pleaded for toleration and a more liberal interpretation of the religious doctrines of the sect. In this leaflet he also gave expression to certain strictures on other members of the caste, apparently to show the inconsistency of their attitude towards moral delinquency. This was regarded by a majority of the caste-people as implying a reflection on them, and they decided on holding a meeting of the *Panchayat* to consider the matter in relation to the plaintiff and his brother Bhagwan Das. The meeting was accordingly held on the 19th June, 1910; whether it was convened in accordance with the rules of the *Panchayat*, and whether plaintiff had notice of the meeting will be discussed shortly. The sitting of the *Panchayat* is said to have lasted from eight in the evening until next morning; so the debate must have been prolonged, and it may fairly be presumed that persons interested in the proceedings had ample opportunity to put in an appearance. Finally, as the plaintiff was in Calcutta and could not attend, and his brother Bhagwan Das did not or would not do so, the *Panchayat* passed a resolution, the publication of which forms the libel charged against the defendant in this action.

The resolution is in these terms:—

"It was settled by the '*panches*' that since B. Gobind Das and B Bhagwan Das publicly circulated among the '*bradris*,' and the non-'*bradris*' a pamphlet about the '*bradri*' against the practices of the *bradri* and did not attend the '*Panchayat*' on being called to do so, these facts show that these gentlemen

circulated the pamphlet simply to disgrace the '*bradri*,' and their not signing the '*chittha*' shows that their views are against the '*Panchayat*'; therefore, it is ordered that until B. Gobind Das and B. Bhagwan Das clear themselves, the family of B. Madho Das be '*baratao-bund*.' "

In the plaint the order recorded by the defendant is given more briefly. Whether the whole resolution or only the substance, as given in the plaint was communicated, the kernel of the publication was the decision to suspend social relations with the plaintiff. The communication was made by the defendant Bishmabhur Das in his capacity of *Chowdhri*, or chairman, of the *Purbia Panchayat* to the 'Western' section, who were, it is not disputed, interested in the result of the proceedings, and to other members of the caste in Benares, Mirzapore, and Chunar. The plaintiff on his return from Calcutta sent a registered letter to the defendant asking for particulars regarding resolution and the facts on which it purported to be based. This letter was submitted to a smaller gathering of the community called a *baithak*, which apparently deals with minor matters affecting the caste; and it was decided to give no reply.

On the 24th August, 1910, the plaintiff brought the present suit. The main allegations on which the action is based are that the meeting of the *Panchayat* at which the resolution was adopted was not held in "good faith;" that it was composed of defendant's friends, "who were under his influence," and in effect it was a sham meeting; that no opportunity was given to him "to get up a defence;" and that in sending the resolution to the *Chowdhri* of the Pachhain section and the caste-people generally the defendant was actuated by malice and ill-will. The plaintiff further alleged that by this act of the defendant, which virtually declares him to be an "outcaste," he has been disgraced and humiliated in the eyes of the members of the caste as well as the public at large and prejudicially affected in his religious and communal rights and that he has also suffered mentally; and he claimed 11,000 rupees as damages for injury caused to him.

The defendant joined issue on all the material allegations; he alleged that the meeting was regularly held, that the proceedings were *bona fide*, that due notice in accordance with the rules of the *Panchayat* was given to the plaintiff and the other members of his family; he further pleaded privilege, alleging

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that in sending a copy of the resolution to the *Pachhain Panchayat* and others he acted in discharge of his duty; and he denied that his action was the outcome of malice or ill-will.

The Subordinate Judge held that a meeting of the *Panchayat* was in fact held on the 19th June, 1910, and that the defendant was "as much liable for the resolution passed at that meeting as any other member" of the *Panchayat*. He held further that the conduct of the defendant (in publishing the resolution) was not privileged, inasmuch as "no notice of the meeting was given to the plaintiff, nor was he told with what offence he was charged. The defendant, therefore, has done an act which constitutes malicious defamation of the plaintiff." In another part of his judgment he says as follows :—

"It was the duty of the *Chowdhri* to publish the resolution complained of, and there is no malice in such publication. The legal malice consisted in not giving opportunity to the plaintiff to defend himself, and in passing that order behind his back. The publication of the order cannot be called malicious."

Their Lordships have referred to these findings of the trial Judge, as they form the sheet-anchor of the plaintiff's case on this appeal.

Proceeding on these grounds, and after an elaborate exposition of the Hindu doctrines relating to the lawfulness of sea voyages, he made a decree in favour of the plaintiff, awarding him a small sum as damages, as he considered he had merely a sentimental cause of action.

The defendant appealed to the High Court of Allahabad, which reversed the decree of the Subordinate Judge and dismissed the action, holding that the communication made by the defendant was privileged, and that there was no evidence of express malice.

On the present appeal, which is by the plaintiff to His Majesty in Council, the arguments have travelled over a rather wide area. In their Lordships' opinion, however, upon the facts proved or admitted in the case, the only points for determination are those on which the High Court proceeded, namely, whether the occasion on which the communication was made by the defendant to the *Chowdhri* of the *Pachhain* section and members of the caste interested in the matter was privileged; and if it was, whether he has forfeited it by reason of the fact that in making the communication he was actuated by what is called in law

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express malice. The onus of establishing this fact that his conduct was the outcome of some improper motive or private spite rests on the plaintiff.

The principles relating to both these questions are well settled and require no examination. Their Lordships need only refer to *Toogood* v. *Spyring* [1], in which Baron Parke enunciated the rule as to privilege which has been accepted in subsequent cases as furnishing the guiding principle on the subject; and to the case of the *London Association for the Protection of Trade* v. *Greenlands (Limited)* [2], and the recent case of *Adam* v. *Ward* [3], in the House of Lords.

The allegation of the plaintiff that the meeting at which the resolution was passed was not a *bona fide* meeting of the *Panchayat* has been clearly disproved; the High Court has expressly found that the *Panchayat* was regularly convened, and that the proceedings were in conformity with its rules, and there is nothing in the Subordinate Judge's judgment to suggest or support a contrary view. The defendant, it is proved, is one of the two *Chowdris* of the *Panchayat*. Their Lordships gather that he is the principal *Chowdri*; anyhow, it is his duty to give effect to the decisions of the *Panchayat*, and to communicate the result of its proceedings to parties interested in the same. Along with the general body of the caste, the *Pachhain* section was interested in the decision of the *Purbia Panchayat* as it might seriously affect their own attitude with regard to the controversy. The resolution suspends provisionally social relations of the caste-people with the plaintiff and his family. The defendant denies that this amounts to "outcasting" the plaintiff; but assuming that it conveys the innuendo he charges, their Lordships are clearly of opinion that the defendant acted in discharge of the duty imposed on him in making the communication to the *Chowdhri* of the other section, and to the caste-people generally, and that the occasion was privileged.

The plaintiff's case, both in his plaint and on the evidence, was that the action of the defendant was the outcome of private spite. Again, the High Court has found that the defendant acted in good faith in the execution of his duty, and that it was not

1. (1834) I. C. M. & R. 181. 2. (1916) 2 A C p. 15. 3. (1917) A. C. 309.

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shown that he was "actuated by ill-will or ulterior or improper motive," nor does the Subordinate Judge hold the contrary. The trial Judge inferred what he calls "legal malice" from the failure of the defendant to give a sufficient personal notice to the plaintiff. Their Lordships do not understand what the learned Judge means by legal malice. To defeat or rebut privilege, the law does not recognise anything short of actual or express malice in the publication of the matter which is charged to be libellous. They find no ground for supposing there was any duty imposed on the defendant beyond properly and duly giving effect to the rules of the *Panchayat*; the inference of "legal" malice from his not doing something more seems to their Lordships quite unwarranted.

But it has been contended that the absence of proper notice to enable the plaintiff to attend the meeting and exculpate himself, being contrary to the principles of natural justice, vitiates the whole proceeding and affects the *bona fides* of the defendant's action. This contention seems to confuse two distinct considerations. Whatever may be the effect of the absence of such a notice with regard to the adjudication of the matter, unless it can be shown that the defendant was bound to examine into the regularity and correctness of the *Panchayat's* decision before issuing a copy of the resolution to parties interested in the question, it would be absurd to say that the privilege is affected or rebutted by want of notice.

It is clear, however, that a notice in accordance with the rules and practice of the *Panchayat* was given in fact to the plaintiff's family, and at the family residence standing in the *Panchayat* register. He no doubt was absent in Calcutta, but the question that was to be debated affected all the members of the family, and any one of them could have attended, if not to answer the charge, at least to ask for an adjournment.

The finding of the Subordinate Judge on this point is distinct. He says:—

"The defendant gave notice to the plaintiff in the usual manner, namely, by sending the barber to the Kothi house in the city. It is not denied that the barber gave notice of the meeting to the plaintiff's *gumastha*, Debi Prasad. For all ordinary *Panchayat* purposes such notice would have been enough. No notice ever was given by the plaintiff to the defendant that the four brothers are separated, and that in the *Panchayat* register, instead of one name, four names should be entered, and that in future all notices should be sent to the different

residential houses of the plaintiff and his brothers, and not to their joint house in the city."

Their Lordships are of opinion that this appeal fails; they will accordingly humbly advise His Majesty that it should be dismissed with costs.

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Solicitor for Appellant:—*Douglas Grant.*

Solicitors for Respondent:—*T. L. Wilson and Co.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, *Chief Justice*, MR. JUSTICE OLDFIELD AND MR. JUSTICE KUMARASWAMI SASTRI.

Kolandai Velu and another ... **1st and 3rd Accused in Sessions Case No. 59 of 1916, on the file of the Court of Session of the North Arcot Division.*

v.

Rev. J. Dequidt ... *Complainant in Do.*

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Christian Marriage Act (XV of 1872), S. 68—Offence under—What constitutes—Hindu by religion performing marriage according to Hindu mode between persons either of whom is a Christian, if guilty.

A Hindu by religion performing a marriage according to the Hindu mode between two persons either of whom is a Christian commits an offence under S 68 of the Christian Marriage Act XV of 1872.

6 M. H. C. R. App. XX. *Queen-Empress* v. *Yohan* 1, approved.

This case came on for hearing on Tuesday, the 31st day of October, 1916.

Accused unrepresented.

Public Prosecutor for the Crown.

The Court (Sadasiva Aiyar and Napier, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH †:—

Napier, J

Napier, J.:—The records of this case have been called for by the High Court on its own motion owing to a doubt whether the case relied on by the Sessions Judge to convict the accused is good law. The facts are that a Hindu by religion, a purohit among

* Cr. R. C. No. 541 of 1916. 12th April, 1917.

† 9th November, 1916.

1. (1892) I. L. R. 17 M. 391.

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the Valluvas (Hindu Pariahs), performed a marriage in the Hindu mode between a Hindu Valluva and a Christian girl, aged 11, belonging to the same community. The priest has been convicted under S. 68 of the Christian Marriage Act XV of 1872, and the father of the girl has also been convicted under the above S. 68 read with S. 114 of the Indian Penal Code, and the Sessions Judge has very properly followed the decision of this Court in *Queen-Empress* v. *Yohan* [1], which follows another decision in 6 M. H. C. R. App. XX. In my opinion, these decisions are wrong and should be reconsidered.

The Christian Marriage Act is a Code repealing and embodying the provisions of several prior Acts which were taken from the numerous English Marriage Acts. The preamble states, " whereas it is expedient to consolidate and amend the law relating to the solemnization in India of the marriages of persons professing the Christian religion." S. 4 provides that " every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void". S. 5 provides that " marriages may be solemnized in India by any of the five different persons: (1) persons who have received ordination, (2) Clergymen of the Church of Scotland, (3) Ministers of religion licensed under the Act, (4) Marriage Registrars appointed under the Act, and (5) persons licensed under this Act to grant certificates of marriage between Native Christians"; and in addition it provides that marriages may be solemnized in the presence of a Marriage Registrar appointed under this Act. The offence charged here is that the accused " solemnized " a marriage in the absence of the Marriage Registrar. Now it is not suggested that the Marriage Registrar is authorised to attend Hindu marriages, and it is to be noted that no person can be appointed a Marriage Registrar other than a Christian (*vide* S. 7). If, therefore, a Hindu does marry a Christian girl according to the customs of his caste, both he and the officiating priest render themselves liable to imprisonment or transportation for ten years. It seems to me that this cannot be the intention of the Act. The object of S. 68 with its highly penal consequences is to punish persons for the serious offence of purporting to solemnize a marriage between two persons

1. (1893) I. L. R. 17 M. 391.

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who honestly believed that they were being married, the consequences of such a void marriage being intensely serious. The English Acts never contemplated marriages in form other than those suitable for Christian and, in my opinion, the Indian Act intended to go no further. The use of the word "solemnized" is, in my view, indicative. It is true that the marriage provided for under the Act need not in all cases be of a religious character just as in England persons can go through a civil ceremony before a Registrar; but the word "solemnized" is never used in this country with reference to a Hindu marriage ceremony. S. 10 provides that "every marriage under this Act shall be solemnized between the hours of 6 in the morning and 7 in the evening." S. 42 provides that where the marriage is solemnized in the presence of a Registrar, one of the parties must make oath that there is not any impediment of kindred or affinity or lawful hindrance to the said marriage. S. 51 provides that in some part of the ceremony each of the parties shall make a declaration of absence of lawful impediment and shall say to the other "I call upon these persons here present to witness that I., A. B., do take C. D., to be my lawful wedded husband (or wife)." Such sections are, on the face of them, inapplicable to Hindu marriages, and the forms in the schedule are all such as are applicable to Christian marriages. It seems to me that the whole Act has reference to nothing but marriages which purport to be solemnized in accordance with usage among Christians, and we would read S. 4 as meaning "every marriage purporting to be a Christian marriage shall be solemnized, &c." If this section is not to be so read, it would follow that the legislature in 1872 has declared void all marriages according to caste custom between a Hindu and a Christian, with the necessary result that the children are illegitimate and cannot acquire rights of property. I very much doubt whether the legislature intended to interfere in this manner with Hindus among whom marriages are regulated by caste custom. There are, as already stated, the decisions reported in 6 M. H. C. R. App. 20. and *Queen-Empress* v. *Yohan* [1], and in addition, there is a later case reported in *Queen-Empress* v. *Paul* [2]. The decision in 6 M. H. C. R. App. 20 was on the language of S. 56 of Act V of 1865 and the Court decided the point on the strict language of the Act. The case was, however, not argued on either side. *Empress* v. *Yohan* [1], purported to follow

1. (1892) I. L. R. 17 M. 391. 2. (1896) I. L. R. 20 M. 12.

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the decision in 6 M. H. C. R. In *Queen-Empress* v. *Paul* [1], the only point taken was that the word "solemnized" could only have reference to a religious ceremony, and the Court, having pointed out that the civil marriage is also solemnized under the Act, thought that this point settled the matter. In my opinion, the question raised is of serious importance in view of the large number of Christians among the lower castes, and I therefore think it right to refer to a Full Bench the question whether a Hindu by religion performing a marriage according to the Hindu mode between two persons either of whom is a Christian commits an offence under S. 68 of the Christian Marriage Act XV of 1872.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J. :—I confess that I was at first not inclined to reopen the question which my learned brother's order just now pronounced refers to a Full Bench as that question had been considered in three cases 6 M. H. C. Reports App. 20, *Queen-Empress* v. *Yohan* [2], and *Queen-Empress* v. *Paul* [1], at sufficient intervals of time, and might, in a manner, be deemed to have been settled. But I have been much impressed by the arguments and considerations put forth from the Bench by my learned brother in the course of the hearing of these cases and as set out in his above order and I cannot say that the judgments in those cases deal so fully and exhaustively with all the aspects of the question as to preclude its authoritative reconsideration by a Full Bench.

For instance, as regards the meaning of the word "solemnize" in S. 68, the decision in *Queen-Empress* v. *Paul* [1], says that it only means "conduct, celebrate or perform" and one of the reasons given is that in a marriage "solemnized" before a Marriage Registrar, "no ceremonies are necessary." But a Marriage Registrar cannot be the professor of any other religion than the Christian Religion (see S. 7 of the Christian Marriage Act) and two ceremonies or ceremonial declarations have to be made before him by each of the parties to the marriage under S. 51 of the Act. Those declarations are : "I do *solemnly declare* that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D."

"I call upon these persons here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife (or husband)."

1. (1896) I. L. R. 20 M. 12. 2 (1892) I. L. R. 17 M. 391.

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I do not see why these 4 indispensable solemn declarations (two by each party) required to be made only before a professing Christian recognized as such by the Government and authorised to record those solemn declarations should not be called "necessary ceremonies" required to validate the marriage. I am inclined to think that "solemnization" in S. 68 indicates the performance of marriages "according to rules, rites, ceremonies and customs" of a Christian Church or after complying with the ceremony of the four solemn declarations prescribed for celebrating marriages before the Christian Marriage Registrar. I think the making of those declarations before the Christian Marriage Registrar means the observance of certain "particular forms and ceremonies" of solemnization and that that is one of the several definite modes of the "solemnization" of marriages contemplated by the Act. In Halsbury, Vol. XVI, S. 581 (page 302), the declarations above mentioned are described in the margin as coming within "forms and ceremonies." If the word "solemnize" as used in the Act merely means "celebration" (including celebration with Hindu or Mussalman rites), the Act cannot be said not to violate the principle of religious neutrality followed almost without exception by the Indian legislature, a violation which visits followers of religions other than the Christian with very severe criminal penalties for doing acts not prohibited by those other faiths. A construction which credits the legislature with such violation should, if possible, be avoided. A Sunni Mussalman male and a male of one of several of the Shiah sects can validly marry according to his law in the permanent form and with Mahomedan rites a "Kitabia," (that is a Jew or a Christian or the follower of any other religion revealed in a Kitab or sacred book provided she is not a fire-worshipper or idolatress). According to some other Shiah sects, he can validly marry her in mute form. (See Ameer Ali, Vol. II, page 320). If S. 68 of the Christian Marriage Act be interpreted as widely as has been done in *Queen Empress* v. *Yohan*, [1] and *Queen Empress* v. *Paul*, [2] a Khazi who performs a marriage between a Mussalman male and a Christian female according to Mussalman rites is liable to the punishment of transportation for ten years. Whereas a Christian Minister or Marriage Registrar who performs a marriage with Christian rites or the declaration ceremonies mentioned in S. 51 between a Mussalman male and a Christian female is not subjected to any such

1. (1892) I. L. R. 17 M. 391. 2. (1896) I. L. R. 20 M. 12.

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penalty and performs a perfectly lawful and valid act. It may be said that when S. 4 declares that a marriage "solemnized" otherwise than in accordance with S. 5 between two persons though one of them alone is a Christian is void, the legislature does interfere with the Mussalman religion and the additional imposition of criminal penalties of a severe nature on such solemnization by the later S. 68 does not in principle, carry the interference further. But if the meaning of the word "solemnize" is confined to (1) the celebration with the marriage rites and ceremonies of a Christian Church and (2) the ceremonies of declaration prescribed to be followed before the Christian Marriage Registrar appointed by the Act, neither of the sections interferes with the tenets and marriage rules of other religions than the Christian. The Full Bench decision in *Queen Empress* v. *Fischer* [1], does not deal directly with the interpretation of the word "solemnize."

However, as I said in the beginning, I have had some hesitation in the matter (especially as the first Christian Marriage Act of 1852 was based on the provisions of English Statutes 14 and 15 Vict. Chapter 10 and other Statutes which did not probably care for the principle of religious neutrality and treated religions other than the Christian with somewhat scant consideration). While therefore I do not think it necessary to express a final opinion on the matter, I do not think it undesirable to have the matter reconsidered by a Full Bench. I accordingly join in the reference proposed by my learned brother.

T. R. Ramachandra Aiyar amicus curiæ on behalf of the accused.

M. D. Devadoss for the complainant.

The Public Prosecutor for the Crown.

The Court expressed the following

Opinion:—We are of opinion that the decisions in 6 M. H. C. R. App. XX and *Queen Empress* v. *Yohan*, [2] which were accepted in *Queen Empress* v. *Paul*, [3] were rightly decided. In our opinion the Act was intended to apply to the marriages of all Christians in India, including marriages where only one of the parties is a Christian. S. 4 expressly says that "any marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions

1. (1891) I. L. R. 14 M. 342=1 M. L. J. 458.
2. (1892) I. L. R. 17 M. 391.
3. (1896) I. L. R. 20 M. 12.

of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void;" and S. 68 merely provides a penalty for solemnizing or professing to solemnize such a marriage contrary to the provisions of the Act. Offences under the section may vary very widely in gravity, and it has been considered necessary, as in England, to provide very heavy maximum sentence which would be wholly inapplicable in such a case as the present, but that does not show that cases such as the present do not come within the section. Nor does the use of the word "solemnize" which is referred to in the order of reference of Napier, J., give rise to our opinion to such an inference. That word which is now invariably used in this connection has a history which may usefully be referred to. The general law of the medieval Church, which regarded marriage as a sacrament as well a contract, did not regard the presence of a priest in orders as essential to the validity of the marriage. The parties might themselves enter into the contract, and the issue born of the marriage would be legitimate, though such a marriage was regarded as clandestine and irregular as contrasted with a marriage *in facie ecclesiae*, and did not carry with it all the incidents of such a marriage. Bracton in a passage cited in *Reg* v. *Millis* [1], whilst upholding the validity of such clandestine marriages says that they did not confer on the wife a right to dower. On the other hand he says that a wife married *in facie ecclesiae* was entitled to dower "*propter solemnitatem*" which we may translate because of the solemnization of the marriage or the performance of the marriage in solemn form. A solemnized marriage is thus a marriage effected in a solemn and regular manner, as opposed to an irregular and clandestine marriage. The question whether there was a stricter rule in England requiring the presence of a priest in orders arose in the great case of *Reg* v. *Millis* [1], and was answered in the affirmative in accordance with the view of the Irish Court owing to the Lords being equally divided. To put an end so far as it could to clandestine marriages the Council of Trent decreed that in future all marriages must be celebrated "*coram parocho*" that is in the presence of the Parish Priest, and also in the presence of witnesses. Its decrees were not received in England or Scotland, but Lord Hardwicke's Act, which was passed in 1754 with the same object, put an end to clandestine

1. (1844) 10 Cl. and F. 534.

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marriages in England by requiring all marriages to be celebrated in the Parish Church. This was considered a hardship by Roman Catholics and Non-conformists, and in 1837 they were allowed to be married at their own places of worship if the marriage was attended by the Registrar, and provision was also made for the solemnization of marriages before the Registrar himself.

As regards Christian marriages in India it was held by Sir Erskine Perry in *Maclean* v. *Cristall*, [1] that the rule in *Reg* v. *Millis* [2] as to the presence of a priest in orders had never been applicable in India. The legislature however considered it necessary to legislate in India on the same lines as in England against irregular and clandestine marriages among Christians, and dealt with the subject in Acts XXV of 1864, V of 1865, and XV of 1872 the Act now in force. Under that Act all marriages of Christians including marriages where only one of the parties is a Christian must be performed, on pain of nullity, in one of the prescribed forms. The Act makes no distinction between Native Christians and other Christians, except that by S. 9 it provides for the issue of licenses to perform marriages between Native Christians to Christians who are not ministers of religion to meet the case of an insufficiency of ministers of religion, and that it directs that the registers of the marriages of Native Christians shall be kept separately from the registers of other Christian marriages, a provision dictated by administrative convenience. The provisons of S. 9 have no bearing on the question now before us as they only apply where both the parties are Native Christians, as expressly declared by Act II of 1892; and therefore marriages of Christians with persons who are not Christians must be solemnized in one of the other manners provided in the Act. The general effect of the Act is as already stated to require that every marriage where one of the parties is a Christian must as a condition of validity be solemnized in one of the prescribed forms, excluding the form prescribed by S. 9 unless both the parties are Native Christians. The Act however is only concerned with the forms in which the marriage is to be solemnized, and does not deal with objections to the validity of the marriage. As pointed out in *Lopez* v. *Lopez* [3], where the history of this legislation is carefully examined, it requires one of the parties to the proposed marriage to make a

1. (1896) I. L. R. 20 M. 12. 2. (1849) Perry's Or. C. 75.
3. (1885) I. L. R. 12 C. 706.

declaration that there is no impediment of kindred or affinity or other lawful hindrance, and also requires that the Minister of religion or Registrar should be satisfied that there is no lawful impediment; but it provides in S. 88 that "nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into." We answer the question in the affirmative.

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A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, *Chief Justice.*

[On a difference of opinion between Abdur Rahim and Napier, JJ.]

Dudekula Lal Sahib ... *(1st Accused in Calendar Case No. 331 of 1916 on the file of the Court of the Sub-Magistrate of Macherla and 1st Appellant in Criminal Appeal No. 65 of 1916 on the file of the Court of the 1st Class Deputy Magistrate of Narasarowpet Division).*

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Criminal Procedure Code, *Ss.* 403, 429, 439 *and* 494—*Summons case—Criminal trespass—Charge sheet by police—Withdrawal of prosecution by the Public Prosecutor before service of summons on accused—Complaint by aggrieved person, on the same facts, charging accused with offence under S.* 447, *I. P. C.*—Autrefois acquit—*Difference of opinion between two judges of the High Court in a Criminal Revision Case—Procedure.*

The police had filed a charge sheet under S. 447, Indian Penal Code against a certain person before a 2nd class Magistrate. A summons was issued but before it was served, the Public Prosecutor with the consent of the Court withdrew from the prosecution under S. 494, Criminal Procedure Code and the accused was then acquitted as required by that section. Thereafter the person on whose land the offence of criminal trespass was alleged to have been committed preferred upon the same facts a complaint charging the accused among other things, with an offence under S. 447, Indian Penal Code. The accused was tried and convicted of that offence.

Held, per *Wallis, C. J.* (agreeing with *Abdur Rahim, J.* and dissenting from *Napier, J.*) that the order of acquittal under S. 494 Criminal Procedure Code so long as it remained in force, operated as a bar to further proceedings for the same offence and that the trial and conviction were bad in law.

Where two Judges of the High Court differ in a Criminal Revision Case, S. 439 of the Criminal Procedure Code read with S. 429 requires the case to be decided by a third Judge and precludes any further appeal under the Letters Patent or any reference to a Full Bench under the Rules of the Court.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code by the District Magistrate of Guntur in his letter, dated 20th January 1917.

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* Cr. R. Case No. 85 of 1917 4th May, 1917.

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[The case came on for hearing before Abdur Rahim and Napier, JJ. on the 17th April.]

Public Prosecutor for the Crown.

The Court made the following

Abdur Rahim, J.

Order :—*Abdur Rahim, J.* :—The question of law which we are asked to consider in the letter of reference arose under the following circumstances :—The Police had filed a charge sheet under S. 447 of the Indian Penal Code against a certain person before a Magistrate with 2nd class powers, a summons was issued but before it was served the Public Prosecutor with the consent of the Court withdrew from the prosecution under S. 494, Criminal Procedure Code, and the accused was then acquitted as required by that section. Thereafter the person on whose field the offence of criminal trespass was alleged to have been committed, preferred upon the same facts a complaint charging the accused with offences under Ss. 143, 447 and 341 of the Indian Penal Code. That case was tried and the accused convicted and sentenced separately for each of the offences. The convictions were on appeal confirmed but the sentences reduced. The District Magistrate under S. 438 of the Criminal Procedure Code has asked us to revise the conviction and sentence under S. 447, on the ground that the acquittal under S. 494 in this case where no charge was required to be framed, operated as a bar to further trial for the same offence.

The effect of an order under S. 494 in a summons-case does not appear to have been the subject of any decision so far as the present question is concerned. I had, however, sitting singly to consider the effect of an acquittal under S. 247 in a case *In the matter of Guggilapu Paddaya of Palakot* [1], and held that it operated as a bar to further proceedings for the same offence so long as the order remained in force. But a divisional bench consisting of my learned brother and Ayling, J., have in a recent case, Criminal Revision Case No. 866 of 1916, held otherwise. It seems to me that no distinction can be drawn between an acquittal under S. 247 and one under S. 494 for the purposes of the present question ; and I need hardly say that in deference to the views expressed by Ayling and Napier, JJ., I have carefully reconsidered the matter. But even a more detailed examination of S. 403 and the other provi-

1. (1910) I. L. R. 34 Mad. 253.

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sions of the Criminal Procedure Code and of the authorities has only confirmed me in my former opinion.

The question turns on the construction of S. 403. Its sub-section (1) says that "a person *who has once been tried by a Court* of competent jurisdiction for an offence and convicted or acquitted" is not liable to be tried again for the same offence, while sub-sections (2) and (4)—sub-section (3) does not throw much light on the question as all convictions must be after trial—in dealing with certain cases where the previous acquittal or conviction would not bar further trial, speak of 'a person acquitted or convicted of any offence' dropping the words 'who has once been tried.' It can hardly be doubted that by the words "a person who has once been tried by a Court of competent jurisdiction for an offence and 'convicted,' or 'acquitted,' in sub-section (1) and "a person 'acquitted' or 'convicted' of any offence" in sub-sections (2) and (4) the legislature contemplated the same set of facts. Now, what is the sense in which the legislature has used the two phrases? In the first place, it must be taken to be a clear implication of sub-sections (2) and (4) that in cases other than those mentioned therein, the provisions of sub-section (1) should apply and the person who has been 'acquitted' or 'convicted' should not be tried again. Then the explanation to the section is important in ascertaining what is intended by sub-section (1). It mentions the orders which are not to be regarded as acquittal for 'purposes of this section' and this can have little signification, if all orders of acquittal passed in accordance with express provisions of the Code were not intended to have the effect defined by the section, *viz.*, the barring of further proceedings. There is no attempt made to discriminate between different orders of acquittal.

An examination of the other provisions of the Criminal Procedure Code shows at once the solicitude evinced by the legislature on the question of the form of orders which the various Criminal Tribunals are to pass in different kinds of proceedings in given circumstances with a view mainly to indicate their respective effects and to provide suitable remedies in case of wrong orders of each category. The list of the orders terminating proceedings given in the explanation seems to be exhaustive and of these the main classes are orders of 'discharge' and 'acquittal.'

In summons-cases the proceedings against an accused person commence with the issue of process, (Chapter XVII on the

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Magistrate taking cognizance of the offence in one of the ways mentioned in the previous chapters. But if in a case of 'complaint' he refused to take cognizance his order would be one dismissing the complaint (S. 203). If the Magistrate took cognizance and issued process, the proceedings are to be terminated by an order either of 'acquittal' or conviction' S. 245) unless the proceedings are stopped under S. 249. The order of 'acquittal' is to be passed if after hearing the evidence the Magistrate finds the accused not guilty (S. 245), or if the complainant does not appear (S. 247) or upon withdrawal of the complaint by the complainant (S. 248), or upon the Public Prosecutor withdrawing from the prosecution (S. 494).

In warrant-cases tried by a Magistrate, the accused is to be 'discharged' where no case is made out and so no charge need be drawn (S. 253) or the Public Prosecutor withdraws from the prosecution before a charge is framed (S. 494); he is to be 'acquitted' if the Magistrate finds him not guilty after a charge has been drawn (S. 258) or the Public Prosecutor withdraws from prosecution (S. 494) after the framing of the charge. Similarly also in Sessions Cases the legislature has carefully provided when an order terminating proceedings is to have the effect of a 'discharge' and when it will operate as an 'acquittal' (see Ss. 209, 213, 305, 307, 333 and 494). Then we find that express previsions are made for the setting aside of orders of discharge (see Ss. 436, 437, 438 and 439) and of acquittal either under S. 417 or under the general powers of revision of the High Court (S. 439). All this leaves no room for doubt that the legislature intended that a person once 'acquitted' shall not be liable to be prosecuted for the same offence, so long as the acquittal is not set aside by the High Court. Even in cases of discharge it has been ruled that no fresh proceedings can be had with respect to the same matter unless the order has been first set aside as provided for in the Criminal Procedure Code. It is suggested in the Judgment of Ayling and Napier, JJ., in Criminal Revision Case No. 866 of 1916 that it does not follow from their construction of S. 403 that an order of acquittal when there has been no decision on the merits, such as for instance an acquittal under S. 247, would be nugatory, but, so far as I can find, they do not point out nor can I see for myself what other effect it can have if it is to be no bar to further proceedings for the same offence,

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Not only do the provisions of S. 403 itself clearly imply that every order of acquittal so long as it is in force is a bar to further proceedings except in the circumstances specified in the Section itself, but I do not think that the words of sub-section (1) necessarily deny that effect to an order of acquittal under S. 494 or S. 247. In summons-cases the 'trial' commences as soon as the Magistrate has taken cognizance of the matter and issued process. The mere fact that Chapter XX is headed 'of the trial of summons-cases by Magistrates' and S. 242 lays down that the first thing that a Magistrate has to do when the accused appears or is brought before him is to ask him to show cause why he should not be convicted, does not indicate that the 'trial' did not commence at an earlier stage within the meaning of the code. In fact Chapter XVII shows that the proceedings before the Magistrate commence with the issue of process, and that the draftsman did not think of distinguishing between 'commencement of proceedings' and 'commencement of trial,' will be apparent from the way both the phrases are used in the marginal notes of S. 271 and in the heading. The word 'tried' or 'trial' has not been defined anywhere. If the trial of a summons-case commences as soon as the process is issued, is there any good reason for saying that an order of acquittal would not come within the meaning of sub-section (1) of S. 403, unless it was passed at a particular stage? It seems to be conceded that if the accused on being questioned under S. 242 denied that he committed the offence and he is acquitted, then sub-section (1) of S. 403 would apply. But such an order may be made without any decision on the merits, on the ground of absence of the complainant (S. 247) or withdrawal from prosecution (S. 248 or S. 494). It would follow therefore that S. 403 sub-section (1) does not require that there should have been a finding on evidence that the accused is not guilty, and if it is not correct to say that in summons-cases proceedings commence only after the accused has been questioned under S. 242, it seems to me that the only possible meaning we can give to the words "who has once been tried" is 'against whom proceedings have been commenced in Court *i. e.*, against whom the Court has 'taken cognizance of an offence and issued process.' On comparing sub-section (1) with the sub-sections (2) and (4) it is clear that the draftsman intended to assign the same scope to the phrase in question in

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sub-section (1) as to the phrase 'a person convicted or acquitted', in sub-sections (2) and (4) so far as this matter is concerned, though it was not a happy idea of his to use different expressions to signify the same thing. I think that if we are not to frustrate the clear intentions of the legislature we must not construe the words 'who has once been tried' in sub-section (1) in any sense other than what I have suggested.

The decided cases so far as they go, support the view of the law which I expressed in *In the matter of Guggilapu Paddaya of Palakot* [1]. One important case which was not then brought to my notice is reported in *Queen Empress* v. *Sivarama* [2], and also in II Weir 654. There it was held by Kernan and Wilkinson, JJ., that a second charge for the same offence against an accused person who was erroneously "discharged," but who ought to have been "acquitted" on withdrawal by the Public Prosecutor from the prosecution under S. 494, Criminal Procedure Code, at the Court of Session, was bad. If a narrow meaning were to be given to the word "tried" in S. 403, it could not be said that the 'trial' had commenced at the date of withdrawal, because up to commitment the proceedings are described in the Criminal Procedure Code as "enquiry" and the word "trial" is used only in connection with proceedings after commitment. The Public Prosecutor withdrew from the prosecution before any charge was framed in the Sessions Court, according to the practice then obtaining. This makes it clear that the charge framed by the committing Magistrate could not have been read to the accused and he could not have answered to any charge in the Sessions Court, when the Public Prosecutor withdrew on the ground, that the sanction on which the prosecution was based was bad. The ruling in II Weir 457 related to a summons-case and it was held there that since the accused had appeared and answered to the charge, apparently meaning that he had been questioned under S. 242, Criminal Procedure Code, he had been "tried within the meaning of S. 403, but it was not laid down that if he had not appeared and been questioned, S. 403 would not apply. In *Panchu Singh* v. *Umor Mahomed Sheikh* [3], an order of "dismissal" in a summons-case under S. 247, Criminal Procedure Code, with respect to the case of an accused person

1. (1910) I. L. R. 34 Mad. 253. 2. (1888) I. L. R. 12 M. 35.
3. (1899) 4 Cal. W. N. 346.

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who did not appear, was treated as a bar to the revival of the charge against him. The two cases in *Bishun Das Ghosh* v. *The King-Emperor* [1] and *Kedar Nath Biswas* v. *Adhin Manji* [2], it may be said, do not specifically deal with the question under consideration, because it is not stated that the fresh proceedings were quashed on the ground that S. 403, Criminal Procedure Code applied. The ground of the decisions however, was that the acquittal of persons other than petitioners on the same allegations had not been set aside in accordance with the law.

I do not purpose to discuss the provisions of English Law relating to "*autrefois acquit*" as the system of Criminal Procedure in this country is obviously so different from that of England that to draw any sort of inference from the state of law on the subject in England, where no such clear distinctions exist between different kinds of orders terminating proceedings and which does not provide similar measures for rectifying wrong orders of acquittal and discharge, would, to my mind, be only misleading.

I therefore agree with the District Magistrate that the conviction and sentence under S. 447 of the Indian Penal Code are bad in law and should be set aside.

My learned brother holds a different view of the law. The paper will therefore be placed before his Lordship the Chief Justice for such orders as to the disposal of the case as he may think fit to pass. I may mention that as the question involved is one of importance, it is desirable, in my opinion, that it should be decided by a Full Bench.

Napier, J.

Napier, J.:—I adhere to the opinion expressed by me in Criminal Revision Case No. 866 of 1916 that it is impossible to treat the words "once been tried by a Court of competent jurisdiction" in S. 403, Criminal Procedure Code, as surplusage, or to apply the word 'tried' to a case where a man has not even been served with the summons. I have no doubt that section is intended to reproduce what is undoubtedly the law in England namely that to plead *autrefois acquit* successfully the accused must have been put in peril either before the Jury or the Magistrate.

As my learned brother takes a different view the case should I think go before a third Judge under S. 439 and 429 of the

1. (1903) 7 Cal. W. N. 493. 2. (1903) 7 C. W. N. 711.

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Criminal Procedure Code but as my learned brother thinks otherwise the matter will be laid before the Chief Justice for orders.

[The case came on for hearing on 1st May 1917 before his Lordship the Chief Justice.]

Public Prosecutor for the Crown.

The Court made the following

The Chief Justice.

Order.—Two learned Judges having differed in a Criminal Revision Case, S. 439 of the Code of Criminal Procedure read with S. 429 requires the case to be decided by a third Judge and precludes any further appeal under the Letters Patent or any reference to a Full Bench under the Rules of the Court.

With reference to this case I have arrived at the same conclusion as Mr. Justice Abdur Rahim.

If Ss. 403 and 494 of the Code of Criminal Procedure had been originally enacted at one and the same time, I should find it very difficult to come to that conclusion. But seeing that the Code of Criminal Procedure, which is founded on the English Law of Criminal Procedure, has been repeatedly modified in the successive Codes of 1861, 1872, 1882 and 1898, when an apparent conflict arises between what would appear to be the intention of the Legislature in one section and what would appear to be its intention in another section, the best method of ascertaining what the intention of the Legislature really is appears to me to be to examine what is the English rule upon the subject and how far that rule has been adopted and what modifications have been subsequently introduced in the successive Codes.

Now in English Law a plea of *autrefois acquit or convict* can only be raised in bar of subsequent proceedings when the conviction or acquittal has been for the same offence in a trial had before a Court of competent jurisdiction. The Attorney-General at any stage of a criminal prosecution may enter "*a nolle prosequi*" and bring the proceedings to an end. But that does not bar fresh proceedings against the accused. Consequently in England when the Prosecution desire not to go on with the case the practice is not to tender further evidence and for the Judge then to direct the jury to acquit. That rule of English Law was embodied in the Code of Criminal Procedure of 1861 in S. 55 as follows: "A person who has once been tried for an offence and

convicted or acquitted of such offence, shall not be liable to be tried again for the same offence,"—words which with certain explanations are still retained in S. 403 of the present Code. Under that Code Public Prosecutors were directed by the Calcutta Court not to withdraw the graver charge and proceed upon the lesser charge because such a course would have the effect of depriving the accused of the benefit of acquittal on the graver charge. (5 Sutherland's Criminal Letters 4). Then came the Code of 1872, S. 61 "A Public Prosecutor may, with the consent of the Court, withdraw any charge against any person in any case of which he is in charge; and upon such withdrawal, if it is made whilst the case is under inquiry, the accused person shall be discharged. If it is made when he is under trial, the accused person shall be acquitted." This was an entirely new departure because it entitled the accused to an acquittal by statute on the withdrawal by the Public Prosecutor and without any reference to the evidence at the trial. It has never been doubted that when the Public Prosecutor withdraws under this section and the accused is acquitted he cannot be subsequently charged for the same offence. Yet, it seems difficult to bring such an acquittal within the language of S. 460, of that Code (now S. 403) and say that he is a person who has been "tried" for an offence and convicted or acquitted. Supposing the Public Prosecutor to intervene immediately after the case is taken up by the Sessions Judge and to withdraw and the accused then to be acquitted, I find great difficulty in saying that the accused has been "tried" and acquitted within the meaning of S. 403 of the present Code. It seems to me that in S. 61 of the Act of 1872 the Legislature introduced a fresh form of statutory acquittal under that section which was intended to have the same operation as an acquittal in accordance with the English rule under S. 460 (now S. 403).

So much for the Code of 1872. It was only in the Code of 1882 that the alteration was made which has given rise to the present case. S. 494 dealing with the withdrawal by the Public Prosecutor, provided that "if the withdrawal is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted."

The reference in the latter part was clearly to summons-cases which deal with more trivial offences and, it seems to me the intention of the Legislature was that the withdrawal by the Public

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Prosecutor at any stage in those trivial cases was to have the same effect as his withdrawal under the previous part of that section, that is to say, that there was to be a final bar of fresh proceedings.

A similar change was introduced as regards this class of cases into what is now S. 247 of the Code, as regards non-appearance of the complainant in a summons-case.

In the Code up to that time such failure to appear by the complainant had merely led to a dismissal of the complaint. But in 1882 to make the law more stringent it was provided, as it still is, that on the non-appearance of the complainant the Magistrate might acquit the accused unless he chose to adjourn. Here again, I think that the intention of the Legislature was that the acquittal should operate as a final bar of further proceedings. The history of the legislation shows, to my mind, a distinction between what I may call the common law plea of *autrefois acquit* as embodied in S. 403 of the Code, and the statutory acquittals which have been introduced in Ss. 494, 247 and 345.

It has not been suggested in this case that the withdrawal from the prosecution by the Public Prosecutor was irregular and in these circumstances I agree with the conclusion arrived at by Mr. Justice Abdur Rahim that the conviction and sentence are bad in law and should be set aside.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, *Chief Justice*, MR. JUSTICE OLDFIELD AND MR. JUSTICE KUMARASWAMY SASTRI.

Peirce Leslie & Co., Ltd., Cochin through their authorised agent James Dell. *Appellant** (*Respondent Decree-holder*).

v.

E. J. Perumal *alias* Kochu Papi ... *Respondent* (*Petitioner Judgment-Debtor*).

F. B.

Peirce Leslie & Co. Ltd. *v.* Perumal

Decree of British Indian Court—Execution—Transmission to Travancore Court for—Jurisdiction of Court passing decree—Application to British Indian Court to send record of suit to Travancore Court for execution if falls under art. 182 of Limitation Act—Limitation Act—Applicability in Travancore—Art. 182—cl. (5)—"*Application in accordance with law to proper court for execution*"—*Meaning—Art. 182 cl.* (6)—"*Notice to show cause why decree should not be executed*"—*What is.*

* A. A. O. No. 343 of 1916. 3rd May, 1917.

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Courts in British India have no power to send their decrees for execution to the Travancore Courts but may and should send to these Courts the documents they require to enable them to execute these decrees under the powers conferred upon them by the legislative authority in Travancore.

An application to a court in British India to send to the Travancore Court the documents required by it to enable it to execute a decree of a British Indian Court under the authority of the Travancore legislature does not fall within art. 182 of the Limitation Act so as to afford a fresh starting point of limitation for the execution of the decree.

Per The Chief Justice; The Indian Limitation Act extends only to British India and has no operation *proprio vigore* in Travancore. And an application 'in accordance with law to the proper Court for execution' in the third column of cl. 5 of art. 182 of the Limitation Act means an application in accordance with the rovisions of the law in British India to be found in the Code of Civil Procedure to which the article refers or elsewhere. An application to the Travancore court to execute the decree of a British court under powers conferred upon it by the pegislative authority in Travancore is therefore not an application "in accordance with law" within the meaning of the clause.

Where on an application to a Court in British India to send the records of the decree of a British Indian Court to the Travancore Court to enable it to execute the decree under the authority of the Travancore legislature a notice is issued to show cause why the decree should not be executed, the notice is not one required by the Code of Civil Procedure, 1908, so as to bring the case within cl. (6) of art. 182 of the Limitation Act.

Appeal against the order of the Court of the Subordinate Judge of Cochin, dated 20th August 1915, in Miscellaneous Petition No. 251 of 1915, in Execution Petition No. 96 of 1915, in Original Suit No. 6 of 1911.

The Court (Oldfield and Bakewell, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Oldfield, J.

Oldfield, J:—I do not dissent from the considerations based on the provisions of the Code, which my learned brother specifies in the order of reference he is about to deliver, but I wish to state clearly why I think that the decision in the recent case, *Chidambara Chetty* v. *Ramanathan Chetty* [1] to which he refers. is not conclusive in this.

That decision relates to the transmission of a decree for execution in the Native State of Pudukotah; and it does not appear to have been suggested that any such provision has been made by the Sovereign authority of that State for execution of British decrees as is shown in the case before us to have been made by the Sovereign authority of Travancore, the state with which we are concerned. This seems to me of considerable importance.

1. (1917) 32 M. L. J. 487.

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because, reciprocity established, an important step will have been taken towards establishing that the Government of British India has committed itself to adoption of both the methods, by which foreign judgments can receive effect, not only to the procedure by suit on them, but also to direct execution of them. *Vide* Bar : Private International Law, 2nd Edition, 943 : Westlake : Private International Law, 5th Edition, 397. The fact that only the first of these methods of enforcing foreign judgments is recognised in England cannot be conclusive, when the conditions in India are essentially different. And it is, as my learned brother points out, a strong reason for the contrary view that the Government of India has entered into agreements with Travancore and other states, which would be one-sided, if our own Courts could not take the action necessary to secure the benefit of them by transmitting decrees. It is of course a question whether such transmission is authorized by the wording of the Code or must be based on the Courts' inherent powers. In any case the application of the latter would in my opinion involve no unduly liberal construction of them. I add that the cases dealt with in the judgment above referred to do not deal with transmission to a State, with which arrangements of the kind now in question have been made.

Bakewell, J.

Bakewell, J :—Two questions have been argued in the case, first whether the Courts in British India have power to send their decrees to the Courts of the State of Travancore for execution, and secondly, if they have this power, whether proceedings thereunder fall within article 182 of the Limitation Act so as to give a fresh period of limitation for further proceedings in execution.

There is a difference of opinion amongst jurists as to the principle upon which the Courts of one State recognize and enforce the decrees of another (see Piggott's Foreign Judgments and Jurisdiction, Part I, Chapter II), but in India it can scarcely be doubted that it is the comity which should exist between the Courts of States united under the same suzerain. Under statutory authority this comity has been recognised by the Governments of India and Travancore for a long time. (See notification of the Government of India of 10th December 1885, and notification of the Maharajah of Travancore of 1st July 1886, set out in the orders of the Madras Government of 30th December 1885, and 29th March 1887). The procedure adopted to enforce the foreign decree

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in both States is simpler than that prescribed in England and other European States (see Piggott, Part I, pages 8, 9) and consists in one Court transmitting a copy of its records to the other and thereupon the latter Court proceeds as if the decree had been passed by itself.

An application must of course be made by the creditor to the former Court, which must be satisfied that its decree is subsisting and is executable in the latter, but otherwise the Court exercises no judicial functions but only performs the ministerial acts of preparing and transmitting the copy of its record. It has been argued that though provision has been made for the enforcement of the decrees of Native States in British India (C. P. C. S. 44) no authority has been given by the Indian Legislature to its own Courts to entertain such an application or perform these acts, and since the hearing of this case this view has been adopted by two learned Judges of this Court. With all respect I am of opinion that when the Legislature and the Government have recognised the existence of this comity it is the duty of the Courts to take the necessary steps into effect and for this purpose to follow the procedure which has been prescribed as regards other Courts.

I have arrived at the same conclusion from an examination of the provisions of the Code of Civil Procedure, 1908. The Code does not define the word "Court" but only the expression "foreign Court" [section 2(5)], and section 39 enacts generally that a Court may send its decree for execution to another Court. The Rules of Practice annexed to the Code do not provide any special form of application for transmission of a decree but merely prescribe the records to be sent (Order XXI, Rule 6); rules framed by this Court, however, direct that application shall be in the same form as an ordinary application for execution and that notice to the debtor shall be given in similar circumstances C. R. P. rule 161).

I do not think that there is any ground for limiting the expression "another Court" in section 39 to a Court situate in British India, and construe it as meaning "a Court in which the decree is executable."

I may point out that a Court could not refuse to supply a party with a properly authenticated copy of its decree for the purpose of filing a suit thereon in the Court of another State when that is the procedure adopted in that Court for the enforcement

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of foreign decrees, and that the transmission of such a copy by the Court itself cannot be said to involve the exercise of jurisdiction

With regard to the second question, paragraph 5 of article 182 of the Limitation Act, 1908, speaks generally of applications "to take some step in aid of execution", and I think that it is not limited to execution in the Court to which the application is made but includes execution in a Court authorised to execute the decree.

Having regard to the difference of opinion already mentioned. we refer the two questions set out above to a Full Bench for decision.

Chamier (instructed by *King and Partridge with him)* for Appellant.

First as to jurisdiction.—Regulation IV of 1061 M. E. of the Travancore State and the rules under it were communicated to the High Court and were published in the Fort Saint George Gazette. See Gazette of April 1887, part 1, p. 282. Vol. IV of the Rules and Orders of the British Indian Government, p. 1614 contain the Order of the Governor-General in Council made under S. 44 of the Code of Civil Procedure. Under Or. 21 R. 6 of the Code a British Indian Court, when transmitting a decree for execution, must give a certificate that the decree has not been satisfied. That shows that in transmitting records the British Indian Court acts in a judicial and not merely in a ministerial capacity. This Court has inherent power to transmit decrees to Native States and the application praying for such transmission is one in accordance with law and saves limitation, *Chidambara Chetty* v. *Ramanathan Chetty* [1]. The reason why there is no provision in the Code as to how decrees of British Indian Courts should be executed in Native States is that the Governor-General in Council cannot legislate for such states while it can for courts in other provinces and for British Courts in Native States.

In the case in *Kasturchand Gujar* v. *Parsha Mahar* [2] there was no regulation such as the Travancore Regulation in the present case.

[*Chief Justice* :—The treaty-making power is vested not in the Legislature but in the Crown and if in exercise of such power an arrangement is arrived at whereby decrees of either courts are to be executed by the others, then it is the duty of everybody to give effect to such arrangement. How is the arrangement in the present case evidence?]

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1 (1917) 32 M. L. J. 487. 2, (1887) I L. R. 12 B. 230.

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By the Regulation of the Travancore State which is reproduced in the Gazette and by the order of the Governor-General in Council made under S. 44 of the Code (see Vol. IV of Orders and Regulations of the British Indian Government, p. 1614.

S. 45 of the Code deals with a British Court. It does not cover Native States at all. That matter was left to be dealt with by treaties. The reason is obvious. While under the Foreign Jurisdiction Act, the Governor-General in Council can legislate for British Courts in Foreign States such as Bangalore, Secunderabad, etc., it cannot do so in the case of Native States. The case in *Ratan Mahanti* v. *Khatoo Sahoo* [1] would be right if the Court to which the decree was asked to be transmitted was a court of a Native State. Then the decision would not be against our contention because there were no regulations and notifications in that case such as we have in the present case. The decision would be wrong if the court in question was a British Court in a Foreign State because then no notification would be necessary.

Then as to limitation:—If this court has jurisdiction to transmit a decree to the Travancore Courts, then the application praying for the issue of notice under Or. 21 R. 22 of the Code and for the transmission of the decree to the Travancore Courts will save limitation under Cl. (5) Cl. (6) of art. 182 of the Limitation Act—See *Varadaraja Mudali* v. *Murugesam Pillai* [2]. The Privy Council case in *Maharajah of Bobbili* v. *Narasaraju Bahadur* [3] merely decides that an application made to an incompetent Court will not be a step in aid and will not save limitation and has no bearing on the present point.

[*Chief Justice*:—Under O. 21, R. 22 of the Code if notice is once issued, the decree holder has a fresh starting point whether the particular method of execution applied for is correct or not.]

[*Oldfield, J*:—My difficulty is whether, in a case in which notice is issued on an application purporting to be for execution but asking for something which the court cannot grant at all, the issue of notice will save limitation.]

Varadaraja Mudali v. *Murugesam Pillai* [2] answers that point in our favour.

[*Chief Justice*:—Or. 21 R. 22 does not speak of execution at all. It simply speaks of issue of notice, however it was issued.]

1. (1902) I. L. R. 29 C. 400 (401). 2. (1915) 30 M. L. J. 460.
3. (1916) I L.R. 39 M. 640=31 M. L. J. 300

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M. D. Devadoss (Luke with him), for Respondents. British Courts are municipal courts governed by enactments of local legislatures. Local legislatures cannot enact for Native States. British courts have not been invested with power to transmit decrees to Native States. A court which has not passed a decree cannot ordinarily execute it.

British Courts must be specially authorised to transmit decrees to foreign courts. The fact that when a decree is transmitted, the foreign court has authority to execute the decree does not show that British Courts have the power to transmit.

Ss. 40, 41, C. P. C. apply to British Courts and prescribe the procedure for execution by one Court of the decree of another Court. In S. 44 the Legislature gives power to our Courts to execute decrees of foreign courts and S. 43 gives power to our courts to execute decrees of British Courts in Foreign States. But the code has not given power to British Courts to transmit their decrees to the courts of Native States.

[*Oldfield, J.*:—The answer to that argument is that the British Legislature cannot prescribe the procedure to be adopted by the courts of Native States for the execution of our decrees.]

British Courts must be expressly empowered to transmit their decrees to the courts of Foreign States. If the argument of the other side that the British Courts have inherent power to transmit their decrees to Native States is correct, they would *a fortiori* have power to transmit their decrees to British Courts established in foreign territory and the specific provision to that effect in S. 45, Civil Procedure Code, would have been unnecessary. That shows that the theory of inherent right is incorrect and that the absence of a provision empowering British Courts to transmit decrees to Native States is a case of more than a mere omission.

The cases in *Kasturchand Gujar* v. *Parsha Mahar* [1], *Ratan Mahanti* v. *Khatoo Sahoo* [2], and *Chidambara Chetty* v. *Ramanathan Chetty* [3], are all in our favour.

Next as to limitation.—The "notice" referred to in art. 182 of the Limitation Act is a notice required by the Code of Civil Procedure. In this case notice was asked to be issued not for

1. (1887) I. L. R. 12 B. 230. 2. (1902) I. L. R. 29 C. 400, 401.
3. (1917) 32 M. L. J. 487.

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the execution of the decree but for its transmission. For that purpose no notice is necessary. The application in question is not an application for execution. Under the Civil Rules of Practice even an application for transmission has to be in the form of an application for execution. *Sripati* v. *Samaldhone* [1] is authority for the position that the notice required by S. 248 of the Old Code should be issued by the executing Court only. Or. 21, R. 22 of the present code is to the same effect.

The Court transmitting a decree is distinguished from one executing it. See *Chutterpat Singh* v. *Rai Bahadur Saita Soomarimull* [2].

Lastly if your Lordships are with us on the previous point the last point is whether the application praying for transmission of a decree to a Native State is a step in aid. We submit it is not because the application prayed for a relief which the court was not competent to grant.

Mere issue of notice is not sufficient under cl. (6) of art. 182 of Indian Limitation Act The application of which notice is issued must be made to a court having jurisdiction, see per Sadasivaiyar, J., in *Varadaraja Mudali* v. *Murugesam Pillai* [3]. An application asking a court to grant a relief which it is not competent to grant is not a proper application. An application for transmission to be a step in aid must be made to a competent court, *Chattar* v. *Newal Singh* [4], *Langtu Pande* v. *Baijnath Saran Pande* [5], *Aghore Kali Debi* v. *Prosunno Coomar Banerjee* [6].

Chamier in reply :—

[*Chief Justice.*—We want to hear you on the question whether the issue of notice under Or. 21, R. 22 by the court called upon to transmit comes within art. 182 cl. (6).]

A Court transmitting a decree is a court executing it. The Privy Council case in *Maharajah of Bobbili* v. *Narasaraju Bahadur* [7] was a case of transmission under the code and therefore it was held that the transmitting court lost jurisdiction after transmission. The present case is not a case of transmission under the Code. Therefore the British Courts will not lose jurisdiction after transmission to Native States.

1. (1910) 15 C. W. N. 661. 2. (1915) 20 C. W. N. 889=I. L. R. 43 C. 903.
3. (1915) 30 M. L. J. 461. 4. (1889) I. L. R. 12 A. 64.
5. (1906) I. L. R. 28 A. 387. 6. (1895) I. L. R. 22 C. 827.
7. (1916) I. L. R. 39 M. 640 : 31 M. L. J. 300.

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[*Devadoss.*—The execution contemplated by the Limitation Act is an execution under the Code. See cl. (5) of Art. 182.]

The words "in aid of execution of decree" in Art. 182 of the Limitation Act apply to execution by any court, either a British Court or that of a Native State.

[*Chief Justice* :—Mr. Devadoss, do you wish to say anything on this last point?]

Devadoss—The act contemplated by the Limitation Act as a step in aid must be one contemplated by the code and transmission of a decree to a court of Native State is not such an act *Gopilandhu* v. *Domburu* [1] and *Abdul Kadir* v. *Krishna Malamal* [2].

[*Chamier* referred to *Haridas Nanabhai* v. *Vithaldas Kisandas* [3] as to what constitutes a step in aid.]

The Court expressed the following

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Opinion;—*The Chief Justice.*—This reference raises questions of novelty and importance as to the execution by the Courts of Native States of decrees passed by Courts in British India. The further investigation which the subject has now received has confirmed me in the opinion expressed in the recent case in *Chidambaram Chetty* v. *Ramanatham Chetty* [4] in accordance with the decisions of the Bombay and Calcutta Courts in *Kasturchand Gujar* v. *Parsha Mahar* [5] and *Ratan Mahanti* v. *Khatoo Sahoo* [6], that S. 42 and the following sections of the Code of Civil Procedure do not authorise us to send or transfer our decrees for execution to the Courts of Native States, but has also satisfied me that this consideration by no means disposes of the question. Those sections have a two fold effect. In the first place they empower the Courts to which a decree is sent for execution to execute it when the Court, to which it is sent is subject to the authority of the Indian Legislature, an effect they cannot have as regards a Court in a Native State which is not subject to this legislative authority. In the second place they have the effect of depriving the Court sending the decree of authority to execute it itself and of making the Court to which the decree is sent the executing Court to all intents and purposes. They in fact effect a transfer of the decree

1. (1888) I. L. R. 11 M. 336.
2. (1914) 26 M. L. J. 433.
3. (1912) I. L. R. 36 B. 638.
4. (1917) 32 M. L. J. 487.
5. (1887) I. L. R. 12 B. 23.
6. (1902) I. L. R. 29 C. 400.

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for purposes of execution. *Maharajah of Bobbili* v. *Narasaraju Bahadur* [1] and *Chutterpat Singh* v. *Rai Bahadur Saita Soomarimull* [2].

Where the Courts of Native States have been empowered by the legislative authority to which they are subject to execute the decrees of British Courts, there is nothing to prevent the Indian Legislature from providing that the decrees of British Courts may be sent to them for execution and that such sending should have the same effect as if the decrees had been sent for execution to Courts in British India. This is exactly what the Indian Legislature has done as regards certain courts in Native States by Act VII of 1888 whereby it inserted in the Code of 1882 a new S. 229 A, now S. 45 of the present Code. With regard to Courts which have been established or continued in Native States by the authority of the Governor General in Council (in the exercise of foreign jurisdiction) and to which S. 45 has been declared to apply by notification issued by the same authority, that section provides that so much of the foregoing Sections (38 to 44) as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send decrees for execution to such Courts. Its effect is to authorize our Courts to transfer their decrees for execution to those Courts, when the legislative authority to which they are subject, the Governor General in Council, has empowered them to execute them. It is important to observe that neither in 1888 nor when the present Code was enacted was any such provision introduced as regards other Courts in Native States, and the inference seems irresistible that Courts in British India are not authorised to send or transfer their decrees for execution to Courts in Native States in the same way as to Courts to which they are authorized to send them by the Code. The omission is the more remarkable with regard to Courts in Native States not established or continued by the authority of the Governor General in Council, because S. 44 provides for the issue of notifications declaring that the decrees of these very Courts may be executed in British India as if they had been passed by the Courts of British India. Such a notification was issued with regard to the Travancore Courts and also the Cochin Courts in 1887 as part of a reciprocal arrangement by which those Courts were to execute the decrees of our Courts, and a Government

1. (1916) I.L.R. 39 M. 640=31 M. L. J. 300 (P.C.) 2. (1915) I. L. R. 43 C. 903.

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Order, dated 29th March 1887 No. 671 (Judicial) directed the Regulations made by the Travancore and Cochin Governments to be communicated to this Court and to be published in the Fort St. George Gazette. Similar notifications have been issued with regard to the Courts of numerous other Native States based on similar undertakings as to execution of our decrees in their Courts; and a Notification 2053 I. B., dated the 22nd September 1911, and printed in British Enactments in force in Native States, Vol. 6, p. 158, notifies for general information the Native States which have consented that the decrees passed by Civil Courts in British India may be executed in their territories by the Courts therein mentioned. It also appears that the decrees of our Courts have been executed by the Travancore Courts and the Courts of other Native States for many years, and it would be very unfortunate if we were obliged to hold that there was any legal impediment in the way of the satisfactory working of the system. There is no such necessity. It is I think clear from an examination of the provisions of the Code of Civil Procedure to which I have referred that the policy of the Indian Legislature has been to leave such decrees to be executed in the Courts of Native States pursuant to the legislative authority of such states, but not to provide, as they have in S. 45 as regards certain other Courts in Native States, for the transfer to them of the decrees of our Courts for execution so as to make them the executing Court as regards such decrees for all purposes with authority to decide all questions arising in the course of execution. The Indian Legislature has so far refrained from making provision for the transfer of these important powers with regard to the decrees of Courts in British India to Courts in Native States other than those specified in S. 45 of the Code.

Coming now to the powers conferred on the Travancore Courts and other Courts in Native States by their own legislative authorities to execute the decrees of Courts in British India, such execution might be authorised upon production by the decree-holder of a certified copy of the decree and an affidavit of non-satisfaction without any communication with the Court in British India which passed the decree. This would appear to be the system at home under the Judgments Extension Atcs of 1868 and 1882 where the procedure is for the decree-holder to get a certificate of the judgment from the officer of the Court which passed it and to register that certificate

in the other Court upon which it becomes executable there as a decree. The regulations made by the Travancore State, and set out in the Government Order already referred to, provide for the execution of the decree upon receipt of a copy of the decree, a certificate of non-satisfaction, and a copy of any orders for execution or a certificate that no such order has been made, and appear to contemplate that those documents should be received from the British Court direct. If this be so, I can see no reason why a British Court should not act in aid of the Travancore Court and furnish them as matter of comity, and I think it its duty to furnish them and that it has inherent powers to do so. But an order that these documents should be sent to the Travancore Court is not an order sending the decree for execution to the Travancore Court, and should no longer be described as in the petition in the present case, as a transfer of the decree to the Travancore Court for execution.

My answer to the first question in the reference is that Courts in British India have no power to send the decrees for execution to the Travancore Courts, but may and should send to these Courts the documents they require to enable them to execute these decrees under the powers conferred upon them by the legislative authority in Travancore.

On this view the words "proceedings thereunder" in the second part of the reference must be read as referring to an application to one of our Courts to send to the Travancore Court the documents required by it to enable it to execute our decree under the authority of the Travancore Legislature, and the question then is whether such an application affords a fresh starting point as regards execution of the decree by our own Courts under article 182 of the Limitation Act. First with regard to the fifth clause in the third column, an application to the Travancore Court to execute the decree of a British Court under powers conferred upon it by the legislative authority in Travancore would not in my opinion be an application "in accordance with law to the proper Court for execution" within the meaning of the article so as to create a fresh starting point for the execution of the decree by the executing Court in British India. The proper Court in my opinion for such an application is the executing Court under the law of British India which, as already shown is not the Travancore Court. The Indian Limitation Act extends only to British India and has no operation *proprio vigore* in Travancore. It prescribes periods of

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limitation as to the filing of suits and the execution of decrees in British India, and when it makes an application in accordance with law to a proper Court a fresh starting point, it must be taken to mean an application in accordance with the provisions of the law in British India to be found in the Code of Civil Procedure to which the article refers or elsewhere. It cannot have been the intention of the legislature to make an application for execution to a Court in a Foreign State under the law of that State and governed by the law of limitation there in force a fresh starting point under our Limitation Act for the execution of our own decrees in our own Courts. If this be so, I am equally of opinion that an application to a British Court to take a step in aid of the execution by a Travancore Court of the decree of a Court in British India would not be an application to take some step in aid of the execution of the decree within the meaning of the fifth clause of the article. Treating the application to the Court in this case as an application to send the necessary documents to the Travancore Court, I think it did not make a fresh starting point under the article.

With regard to the sixth clause, notice to show cause why the decree should not be executed was no doubt issued in the present case by the Court in British India prior to the so called transmission of the decree to the Travancore Court. That however was not in my opinion a notice required by the Code of Civil Procedure, 1908 so as to bring the case within the article. In the first place the Civil Procedure Code only extends to British India, and does not require any notice to be sent as a preliminary to the execution of a decree by a Court in Travancore. Secondly, it has recently been held by a Full Bench of the Calcutta Court in *Chutterpat Singh* v. *Rai Bahadur Satia Soomarimall* [1] that where the transfer of the decree for execution is authorized by the Code, the Code requires the notice to be sent by the Court to which the decree has been transferred for execution. My answer to the second question is in the negative.

Oldfield, J.

Oldfield, J.:—I respectfully agree with the conclusion that our Courts are entitled in the exercise of the inherent powers recognized in S. 151 of the Code of Civil Procedure to send the requisite documents to Courts in foreign states, with which the necessary arrangements have been made, and therefore to entertain applications asking them to do so.

1. (1915) I. L. R. 43 C. 903. [F. B.]

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But, as the powers invoked are inherent, it follows that they cannot be identified with any specifically conferred by the Code to do what it authorizes or to produce any result, for which it provides. There can therefore be no question of the issue of any notice being required by the Code in connection with their exercise or of such issue as the starting point for a fresh period of limitation under article No. 182 (6) Schedule I of the Limitation Act; and this is not affected by the fact that the Court executing the decree may properly exercise its discretion with regard to the issue of notice to the judgment debtor before deciding to use the powers in question.

The remaining contention is that the decree-holder's application for the sending of the necessary documents to the foreign Court affords a fresh starting point for limitation under article No. 182 (5), because it is for the taking of a step in aid of execution. It may be conceded that the application is, as the article requires, made in accordance with law to the proper Court. But, as was decided in *Bhagwan Jethiram* v. *Dhondi* [1]. the execution, which is contemplated, must also be in accordance with law; and I do not think that this requirement is satisfied by the fact relied on before us, that it will be in accordance with the foreign law administered by the Court, where proceedings are to be taken. The point is not, so far as we have been shown, covered by direct authority. But a ground of decision can be found in the principle that "the law of limitation is a law relating to procedure having reference only to the *lex fori*" and that "no Court is obliged to depart from its own notions of judicial order from mere comity to any foreign nation." *Ruckmaboye* v. *Lulloobhoy Motichund* [2]. and Story's Conflict of Laws 576, 580. It is the British Court, which has to decide whether the conditions postulated by the article are fulfilled and on this principle it will do so in accordance with its own law and without reference to other codes, which may include provisions regarding the executability and methods of execution of decrees different from those in our own. It may be argued that the existence of such provisions in the foreign code in question does not entail that they will in fact be employed or that any execution will take place, which the British Court could not approve and adopt. But that is beside the point, which is that the validity of a step in aid need not be tested, when

1. (1896) I. L. R. 22 B. 83. 2. (1851-2) 5 M. I. A. 234.

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or if any execution has taken place, but must be determinable, whether any takes place or not, with reference to the legality of the execution, which the step taken is contemplated as aiding. In the case of transmission by one British Court to another, that legality could not be doubtful, since the recipient Court could execute only in accordance with British law. It will be otherwise, when (as in the present case) the recipient Court is foreign and it is uncertain whether its proceedings in execution will conform to that law, the only one which our Courts dealing with the question of limitation can consider. In the absence of ground for any presumption that the foreign Court's proceedings in execution will be in accordance with the law applicable, an application to take a step in aid of them will not be one contemplated in article No. 182 (5).

For these reasons I would respectfully concur in the answers to the questions referred, which his Lordship the Chief Justice proposes.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J. :—I have had the advantage of reading the judgments of the Chief Justice and Mr. Justice Oldfield who agrees with the conclusion arrived at by my Lord. I entirely agree with the judgments and as they deal fully with all the points raised I have nothing useful to add.

A. S. V.

PRIVY COUNCIL.

PRESENT:—LORD BUCKMASTER, LORD PARKER OF WADDINGTON, LORD PARMOOR, MR. AMEER ALI AND SIR WALTER PHILLIMORE, BART.

[On Appeal from the High Court of Judicature at Madras.]

Kandukuri Balasurya Prasadha Row and another. ... *Appellants**

v.

The Secretary of State for India in Council ... *Respondent.*

(Three Consolidated Appeals).

P. C.

Kandukuri Balasurya Prasadha Row v. Secretary of State for India.

Water Cess—Irrigation—Permanent Settlement—Extent of zemindar's or inamdar's right of user under engagements with Government—River or stream belonging to Government—" Free of separate charge "—Madras Act VII of 1865, *Ss.* 1, 2—" *Standing and flowing water "—Madras Act III of* 1905, *S.* 2.

* P. C. Appeals 102, 106 and 107 of 14.

9, 12, 13, 15, 16, 19, 20 and 22 March, 1917.

P. C.

Kandukuri Balasurya Prasadha Row v. Secretary of State for India.

The Government claimed under Madras Act VII of 1865, to levy water-cess upon permanently settled lands (zeraiti and inam) in so far as the user of Government water for irrigation exceeded the user at the time of the permanent settlement, whether in respect of the area irrigated or in respect of the fact that two crops were raised instead of one.

It was held by the Privy Council, agreeing with the Courts below, that the effect of the permanent settlement was to vest the then existing irrigation channels in the zemindars through or within whose zemindaries the same respectively passed or were situate.

It was also held by the Privy Council (in this, differing from the Courts below) that the right of user from such irrigation channels which passed by the permanent settlement could be measured only by the physical conditions existing at that time and not by the extent to which the water was in fact used; and that assuming the river with which the channels connected belonged to the Government the zemindar's right of taking water from it was limited only by the size of the channels and the nature of the sluices and works by which water was diverted from the river into the channels. The Government could not complain if the amount of water taken were within this limit. Once the water was lawfully taken into the channels, Government had nothing further to do with the matter.

Whether or not there are other cases which the first proviso to S. 1 of Madras Act VII of 1865 was intended to meet, it at least covers the case of engagements with the Government arising out of the permanent settlement. If by virtue of such settlement a zemindar is entitled to take and use water from any such source of supply as mentioned in the Cess Act and this right is part of or appurtenant to the property in respect of which he pays a single jumma or peishcush, no cess can be levied under the Act in respect of water which he is entitled to take and use.

Semble, that the second proviso is intended similarly to safeguard the Ryots' rights under the periodical temporary settlements.

Consolidated appeals from a decree of the Madras High Court, (*Miller and Munro, JJ.*) confirming one and modifying two decrees of the District Judge of Ganjam.

The facts of the case are sufficiently set forth in their Lordships' judgment. The suits out of which the appeals arose were, as there stated, brought by the Appellants to recover monies claimed by the respondent as water cess and paid by their predecessor under protest. The suits were dismissed by the first Court whose decision was confirmed (with modifications in two cases) by the High Court. The judgment of the latter Court, which contains a fuller statement of the facts is reported at 20 M. L. J. 823 : 34 Mad. 295.

W. H. Upjohn, K. C. and *Sir W. Garth* for Appellants.

P. O. Lawrence, K. C., Sir Erle Richards, K. C. and *Kenworthy Brown* for Respondent.

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Upjohn, K. C., for Appellants:—The Act under which Government claim to make these charges was passed in 1865, but it is only recently that it has been sought to apply it in this way; and then only under a misinterpretation of Madras Act 3 of 1905. Government have acted on the view that S. 2 of that Act gives them a right to water itself. The High Court have adopted this view: they say "so far as this case is concerned the provisions of S. 2 amount to a declaration, that subject to easement and usual rights of other landholders, all standing and flowing waters which are not the property of any one else are the property of Government". The High Court have overlooked the fact that the section only intended to deal with the bed of standing and flowing water: all that it vests in Government is the bed. S. 1 and other sections of the Act support this view. Flowing water cannot be the subject of property except by an Act of the Legislature, but the High Court's construction of S. 2 treats zemindars as possible owners of it. The Act contains no other provisions as to water and no penalties to enforce Government's right to "standing or flowing water". "Standing and flowing water" merely sweep in other things "than rivers, streams and water courses" and they are followed by the words "and all lands."

[*Sir W. Phillimore*:—In old conveyances "all waters" was inserted to mean beds of other waters than specified].

The title and preamble of the Act show that it is merely a declaratory Act as to land. I submit that the alleged right of property in the water claimed by the respondent does not exist. The law of India as to water rights is in general accordance with the law of England, which does not recognise any such right and the authorities cited in the Indian cases are mainly English. *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk* [1], *Kali Kishen Tagore* v. *Jodoo Lal Mullick* [2], *Perumal* v. *Ramasami Chetti* [3]: *Debi Pershad Singh* v. *Joynath Singh* [4] referred to.

The Indian Easements Act of 1882 (Act 5 of 1882) is declaratory of the Common Law: Vide S. 7 Illustrations (f to j).

1. (1878) 4 A. C. 121 := L. R. 6 I. A. 33 = I. L. R. 4 C. 633.
2. (1879) L. R. 6 I. A. 190.
3. (1887) I. L. R. 11. M. 16, 22.
4. (1897) L. R. 24 I. A. 60, 68 = I. L. R. 24 C. 865.

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In addition to claiming a right of property in the water itself, Government relies upon its general right and duty as Sovereign to regulate matters of irrigation. I am not concerned to deny this right or duty: but I submit that it does not extend to empowering Government to interfere with the legal rights of private individuals; whether these latter are owners or tenants. *Ponnusawmi Tevar* v. *Collector of Madura* [1]; *Kristna Ayyan* v. *Venkatachella* [2]; *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil* [3]; *Ramachandra* v. *Narayanaswami* [4]; *Sankaravadivelu Pillai* v. *Secretary of State* [5]; and *Ambalavana Pandara Sannathi* v. *Secretary of State* [6], Peacock's Easements in British India (2 Edn. 1909) pp 113, 114.

Madras Act 7 of 1865 does not apply to a case like this but only to cases where Government undertakes a scheme of irrigation for the benefit of the public. Here the Government merely came in as one of several landholders, and what it did was done by it as landlord for the sake of its own tenants. The Act only refers to channels constructed by the Government as Government, and does not include any channel which the Government made by arrangement with its tenants for their benefit. The channels here were not so far as the evidence goes made by Government at all: and the repairs were made by the zemindars as well as by Government.

S. 1 of the Act contains a proviso that it is not to interfere with any engagement by which the zemindar is entitled to irrigation free of separate charge. I submit that it is not a proper inference from the facts admitted and proved that Government only granted the right of irrigation to the extent that the land was then being cultivated. It is conceivable that the area cultivated might be increased without taking more water: is it said that this cannot be done without paying cess?

[*Lord Parmoor*:—The Government engagement may be to give you no more than the quantity of water required to irrigate so much wet land.]

1. (1869) 5 M. H. C. R. 6. (11, 12, 19, 22, 25.)
2. (1872) 7 M. H. C. R. 60, 64.
3. (1879) I. L. R. 7 B. 209.
4. (1892) I. L. R. 16 Mad. 333=2 M. L. J. 279.
5. (1904) I. L. R. 28 M. 72=15 M. L. J. 32.
6. (1905) I. L. R. 28 M. 539=15 M. L. J 251.

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That is quite possible *a priori*: but in measuring the extent of the engagement it is necessary to look at the state of things at the time of the grant and what happened after the grant.

I submit that from the facts and terms of the grants to the zemindars, and from the further fact that no attempt was made to charge these cesses till quite recently, there should be inferred a grant to the zemindar of as much water as he could get subject to his not prejudicing the rights of other persons having similar sanads: and that Government did not grant only so much water as was required for the land then being cultivated. Further, even if Government did not contemplate an extension of the land cultivated, the *law* is that the owner of a dominant tenement with a right to a flow of water can use that flow for any purpose connected with his tenement.

The preamble of the Act states that Government had just completed large irrigation works in certain Districts: and that it is right and proper Government should get a return on account of the increased profits derivable from lands irrigated by such works. The provisions of the Act should be construed accordingly. It does not apply when the irrigation channels were neither constructed by nor belong to Government. The mere ownership of part of the irrigation works is not sufficient to bring it into operation: there must be a complete work of irrigation constructed by Government for the public benefit. Here Government did not get the ownership even of parts of the channel till after the settlement: and such expenditure as it incurred was for the benefit of its own estates.

"Constructed" in S. 1 must apply to "Channel tank or work" "From" in the same section connotes a *source*; it is not the same as "through". The channels here do not belong to Government, nor were they constructed by Government. No case has been put forward under S. 1 (b): nor has the opinion of the revenue officer, therein mentioned, been proved. The provisions in S. 1 (*b*), which were introduced by Act 5 of 1900, support the view that cl. (*a*) only applies to an entire work of irrigation.

It was the policy of the Government, as laid down by Regulation 25 of 1802, to promote the "progress of agriculture" by fixing the revenue in perpetuity: it would be against such policy to amerce the zemindar for raising a second crop.

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An easement passing by an implied grant is not restricted to what is necessary for the use of the tenement conveyed; it is enough that it is convenient for that use. *Watts* v. *Kelson* [1]. Reference was also made to *Secretary of State* v. *Perumal Pillai and others* [2], *Chidambara Rao* v. *Secretary of State* [3], Indian Easements Act, 1882 (Act 5 of 1882) S. 13, *Maria Susai Mudaliyar* v. *Secretary of State* [4], *Lutchmee Doss* v. *Secretary of State* [5], *Secretary of State* v. *Swami Naratheeswar* [6] and *Secretary of State* v. *Ambalavana Pandara Sannidhi* [7], (now under appeal.)

Sir W. Garth followed:—and pointed out that the expense of repairing the channels were not borne exclusively by Government, as had been suggested, but that the zemindars contributed.

P. O. Lawrence, K. C., for respondent:—In India the main public user of water is for irrigation: in England for drainage and navigation. Hence a customary law has grown up in Madras (and perhaps in Bombay also) that Government has a right to regulate and dispose of the water of rivers for irrigation. The right is a right to take away the water and dispose of it for the benefit of non-riparian land. The Act of 1905 did not make new law. The ownership of rivers and streams has always been in the Government. The Act of 1865 was passed on that basis. The English law of riparian ownership has been applied to that right, but its application is limited.

Government recognises that rights, not to the water itself, but to the use of the water, can be acquired by riparian owners. Three main rights have been established, qualifying the general right of Government to flowing water.

1. The right of ryots under Government to have a supply of water for their irrigation; limited by this, that so far as Government gives them the customary amount it can be given from any channel.

1. (1871) 6 Ch. App. 166, 175.
2. (1900) I. L. R. 24 M. 279, 282=11 M. L. J. 117.
3. (1902) I. L. R. 26 M. 66.
4. (1904) 14 Mad. L. J. 350.
5. (1909) I. L. R. 32 M. 456=19 M. L. J. 470.
6. (1910) I. L. R. 33 M. 21=20 M. L. J. 1.
7. (1910) I. L. R. 34 M. 366.

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2. The natural right of the riparian owner to the use of the water adjoining his land—not *qua* owner of the bed, but by being in contact with the water.

3. Easement rights, which may be acquired by persons using water for extraordinary purposes as against the riparian owners both above and below, to use so much of the water as to damage them.

But these rights do not in any way destroy the right of Government to the property in the water; they are something like the right to dig gravel on another man's land.

It is strange to us that there should be ownership of water running from one man's land to another but such is the law of India.

[*Sir W. Phillimore* :—Flowing water may be compared to an animal *ferae naturae,* which is only the subject of ownership when kept within bounds.]

[*Mr. Ameer Ali* :—Government took away all the water of the Sone and turned it into their own canal.]

[*Sir W. Phillimore* :—Could they do that without an Act of Parliament ?].

Yes.

Lord Buckmaster :—If your view is correct, all the discussion as to the ownership of the Vamsadhara river becomes unnecessary. Everybody who uses the water whether it comes from a channel or from anything else will have to pay for it, not because it comes from the channel but because it is the property of the Government.

That is my proposition. Government have contended for centuries that they own the water, and Act 3 of 1905 says so in so many words. The right of the English riparian owner to have the whole flow past his land is inconsistent with the right of Government, always allowed in India, to stop or dam or divert the water.

Even Act 7 of 1865 contemplated ownership of running water. A river is a natural stream. " Natural stream " is defined in the Indian Easements Act, 1882, S. 7 Illustration (i) (Explanation). "Stream" was inserted in S. 1 of Act 7 of 1865 after "river"

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to indicate that the body of water only was intended, not necessarily the bed or banks. The water belongs to Government quite irrespective of the bed of the river : *Fischer* v. *Secretary of State* [1].

Whether or not this was so before 1905, Act 3 of that year puts the matter beyond doubt. It recognises the ownership of flowing and standing water. The ownership of flowing water cannot be shown to be in any one else, so it must be in the Government.

[*Lord Buckmaster* :—But it must be assumed Appellants have acquired the right to take water and if that be so the Act of 1905 would not apply].

Easement rights do not destroy the right of property. Till the water is taken, the property in the whole is in Government. The right to take limits the owner's right.

[*Sir W. Phillimore* :—The whole cake is the Government's the slice out of the cake must be proved. Government may be entitled to charge for the water even though the other man may have the right to take it.]

Act 7 of 1865 applies whether or not the person taxed is entitled to take or could be prevented from taking. It was not till 1900 that the ryots were excepted. It was for this very reason that the proviso was inserted that the case should not apply when the engagement gave a right to take free of charge.

When the Act of 1865 refers to a river or stream belonging to Government, the right intended is the right not to the bed but to the paramount control, it is the right of administration.

Three propositions were established by *Fischer* v. *Secretary of State* [1].

1. Riparian owner cannot recover from Government without proof of damage.

2. The rights of Government are higher than those of private owners.

3. The rights of Government are irrespective of the right to the bed.

1. (1908) I. L. R. 32 M. 141, 160=19 M. L. J. 131.

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Whenever Government controls the distribution, the stream (tank &c.) "belongs to" Government.

Since the decision under appeal there have been two further cases on this very point: *Secretary of State* v. *Janakiramayya* [1], on appeal from the judgment reported at 37 Mad. 322 and *Secretary of State* v. *Maharaja of Bobbili* [2].

[*Lord Parmoor*:—The Act of 1905 recognises ownership of flowing water in private hands as well as in those of Government. It may give Government a right subject to other existing rights of private individuals].

Flowing water in a natural stream may conceivably be granted by Government to a private person: *Lord Fitzhardinge* v. *Purcell* [3]. But in India, except by grant from Government, there can be no such ownership in private persons.

[*Lord Parker*:—If the right to use the water depends upon ownership, there is no reason why it should not pass under the grants. I put it on the ground of prerogative right. In India it is the duty of the Government to control the distribution of water.]

[*Lord Buckmaster*:—There is no authority on the construction of S. 2 of Act 3 of 1905, but if it does not vest the property of flowing water in the Government, what does it mean?].

I submit it is conclusive.

[*Lord Parker*:—If Government's right were a matter of ownership, it could pass by the grant—if of prerogative, it could not: your position may be better if it were not a matter of ownership].

If on the proper construction of the Act the ownership of the flowing water in the river is confined to cases where Government owns the bed, then on the evidence three out of the four channels in question took off from points where the river was on Government land.

As to the alleged engagement by which the zemindars are said to be protected, it is material to consider the original frame of Act 7 of 1865. Originally, the cess was charged on ryots although

1. (1915) 29 M. L. J. 389 (F. B.) 2. (1916) 30 M. L. J. 168.
3. (1908) 2 Ch. 139.

they were entitled to water. By the revenue system of Madras, the tax is imposed on the user of the water, whether that user is of right or not, unless the land falls within the second proviso to S. 1:—Baden Powell's Land tenures, Vol. 3.

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It follows that the engagement of Government with the zemindars, which excepts them from liability to pay cess, must be an engagement to give water free of tax. The peishcush being fixed, the zemindars were in the same position for all time as ryots are for the period between settlements. The measure of their user must be the same. My submission is that Government have to supply free so much and no more water as was supplied at the time of the permanent settlement. The peishcush fixed at the permanent settlement represented the assessment due for only one crop: it does not exempt the zemindar from water rate in respect of the second crop.

[*Lord Parker* :—If the tax was fixed on the produce of one crop then any new crop that came in after the permanent settlement would not be assessable. If your construction of Act 7 of 1865 would make it violate the permanent settlement that is a very strong reason for adopting another construction.]

In Secretary of State v. *Perumal Pillai* [1] the claim of Government to levy water rate in respect of a second crop was disallowed only because the water came from the zemindar's own tank: the judgment recognised however that the cess would be payable if the water were shown to belong to Government. In the present case the water was supplied from a Government source.

[*Lord Buckmaster* :—The permanent settlement is for the object of ensuring the best possible use of the land].

Yes, in a limited sense.

[*Lord Buckmaster* :—I should say, in an unlimited sense that is what it was for. First you find all sorts of things exempted, *e. g.* professional income: then you get the man encouraged to increase cultivation and promised that his profit shall not by any means be taken away. Now you seek to tax the means by which he improves the property].

[*Sir W. Phillimore* :—Do you say they are taking more water ?]

1. (1900) I. L. R. 24 M. 279, 283.

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Yes : there are concurrent findings of fact.

[*Lord Buckmaster* :—The findings are that there is more irrigation, not that more water is taken. The two are totally different. Your case is that he is using the water for a more extended object : it does not in any way depend on the volume of water.]

There was more land irrigated, and more water used for irrigation. The question is what irrigation they had, not what was the volume of water flowing through the channels.

Even allowing that there was an implied engagement in the sanads that the zemindars should have water for further cultivation there was no such engagement that they should have it free of charge. There is not express exemption from future taxation.

[*Lord Buckmaster* :—According to you this land has never been exempt from taxation; but Government have not thought fit to levy the tax.]

There is no evidence that the peishcush, at the settlement of the Northen Sarkars in 1803, was fixed so as to include future extensions of cultivation. It was fixed on the produce, and was a share of the produce. (Reference was made to the Fifth Report, p. 6 and to the Instructions to Collectors, No. 17 in Appendix 18 to that Report).

The onus is on a person claiming under a sanad to show that any land is included in it, and he has to show that the land has been assessed. Canals were never assessed. The permanent land tax did not include free of charge any water that was not being delivered at the time of the permanent settlement. The tax was calculated on so much wet land and so much dry—possibly on so much land with second crop.

The sanad certainly does not include the bed of the river and probably does not include the channels. The onus is on the other side to show that it does. *Maharaja Jagadindra Nath Roy* v. *Secretary of State* [1].

The zemindar had no title prior to the permanent settlement: and it was only those lands which were revenue bearing at the time of the settlement which were confirmed to him : there was no conveyance.

1. (1902) L. R. 30 I. A. 44, (52)=I. L. R. 30 C. 291.

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[*Lord Buckmaster*:—The whole point of the permanent settlement was that the zemindar might improve his land and increase cultivation without paying more. To make dry land wet may be equivalent to taking in fresh land.]

The water cess does not come under the head of land tax at all. I admit that for current wet land it would be double taxation to put on the cess, but it is not so with land hitherto dry.

[*Lord Buckmaster*:—But the potentialities of the dry may have been taken into account. There was to be no increase in the fixed jama, whatever change or improvement took place. You do not tax the water, you tax irrigation by the water: therefore you tax the land.]

[*Upjohn, K. C.*:—The tax is in terms levied on the land.]

It is a perfectly new form of taxation. The land tax is assessed on the produce: it was taken on the produce of each year. The water rate is distinct.

In so far as the inam lands are concerned, appellants sue as inamdars, not as zemindars. Inam lands were excluded from the permanent settlement: they are outside the zemindary. The Government or previous sovereigns had parted with the inam lands, and their only interest was that they were owners of the quit rents. A channel within an inam grant will not belong to the inamdar unless specially granted:—*Ambalavana Pandara Sannadhi* v. *Secretary of State* [1].

[*Lord Buckmaster*: The judges there say the channels were not granted but the wells were: I cannot see it myself. Possibly it may be that an inam grant leaves Government the reversion, and in the case of zemindari nothing is left].

If a river belonging to Government only means so much of the river of which Government owns the bed, I am still within subsection (a) of S. 1 of Act 7 of 1865 as to three of the channels which all take off where Government owns the river bed. The case of the Mobagam channel is different. In England the law is that half of the bed of the river passes by a grant of the riparian land: Non constate that this is so in India.

[*Upjohn, K. C.*:—referred to the pleadings. This point is not open to them, no issue was raised and it is a question of fact.]

1. (1905) I. L. R. 28 Mad. 539=15 M. L. J. 251.

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It depends on the presumption that half the bed belongs to the riparian owner: that is a question of law. It has never been laid down that such a presumption applies to India. In the case of big rivers grave doubts as to its application were expressed by Lord Hobhouse in *Sribalasu Ramalakshmamma* v. *Collector of Godaveri*[1] and the subject is discussed at length in *Srinath Roy* v. *Dinabandhu Sen*,[2], where Lord Sumner doubted whether English law was applicable to rivers generally. I submit that it does apply and that it is not proved against me that the bed of the river does not belong to Government even where the Mobagam channel breaks off.

Richards, K. C. followed:—The Government gave a user limited in extent. The settlement of the Northern Sirkars is described in Baden Powell's Land Systems, Vol. 3, pp. 6, 7, 17, 128. The purchasers of haveli lands were not in the position of the Bengal zemindars. In Southern Madras there were no zemindars, (?) and the attempt to create them failed. Hence the ryotwari system was introduced, under which the individual ryots were settled with. The settlement with the zemindars in the Northern Sirkars was on the same principle. The sanads given to them were not a grant of full water rights (Reference was made to the Standing Orders of the Board of Revenue (1913, Vol. 1).

The evidence shows that Appellants have used more water than they did in the past. There are concurrent findings to this effect. Further, the matter is one as to which they have special knowledge, and the burden of proof is on them.—Indian Evidence Act (1 of 1872) S. 106.

As to the inamdars, the rights of the actual cultivator were not affected by the permanent settlement with the zemindars, Regulation 4 of 1822. If, therefore, the inamdars rely upon any "engagement" it must be an engagement made not at the permanent settlement, but at that of 1888.

Upjohn, K. C., replied.

Their Lordship's judgment was delivered (May 3, 1917) by

Lord Parker of Waddington

Lord Parker of Waddington:—These are consolidated appeals from a decree of the High Court of Madras, dated the 9th September, 1910, and made in three actions, in each of which

1. (1899) L. R. 26 I. A. 107 (111, 112).
2. (1914) L. R. 41 I. A. 221=27 M. L. J. 449.

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Kandukuri Maha Lakshmamma (who has since died and is now represented by the appellants) was plaintiff and the Secretary of State for India was defendant. The plaintiff sought in each action to recover from the Secretary of State monies paid under protest in respect of water cesses which the Government of India had levied under the Madras Act No. VII of 1865, as amended by the Act No. V of 1900. The point to be determined was the right of the Government to levy these cesses. The cess the subject-matter of the first action was levied in respect of water used for the second crop on zeraiti lands, part of the estates of Urlam and Devadi, of which the plaintiff was owner. Devadi was originally part of Urlam, and is hereinafter included in the expression "the Urlam Estate" or "the Urlam Zemindari." The cess the subject of the second action was levied in respect of water used for (1) the first crop on so much of the irrigated zeraiti lands belonging to the Urlam Estate as the Government alleged to be in excess of the area so irrigated at the time of the permanent settlement; (2) the first crop on so much of certain inam lands situate within the Urlam Estate, and of which the plaintiff was the inamdar, as the Government alleged to be in excess of the mamul or customary wet at the dates when such inam lands were respectively originally granted or subsequently settled; (3) the second crop on the whole of such inam lands. The cess the subject of the third action was levied in respect of water used both on zeraiti and inam lands for all the purposes above mentioned with respect to the cess the subject of the second action. It may be mentioned that the plaintiff succeeded in the High Court on the issue as to the Government's right to levy a cess in respect of water used for the second crop on all the inam lands except those situate in the village of Venkatapuram. The Government has not appealed to His Majesty in Council. It would seem therefore that the questions their Lordships have to decide are the following: *First*: Is the Government entitled under the Act to levy a cess for water used for the second crop on zeraiti lands parcel of the Urlam Estate? *Second*: The same question as to inam lands in the village of Venkatapuram. *Third*: Is the Government entitled under the Act to levy a cess for water used for the first crop on so much of the zeraiti lands parcel of the Urlam Estate as may be in excess of the area of such lands irrigated at the time of the permanent settlement? *Fourth*: Is the Government entitled under the Act to levy a

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cess for water used for the first crop on so much of the inam lands within the Urlam Estate as is in excess of the area of such lands irrigated at the respective dates when these inam lands were originally granted or subsequently settled? In order to answer these questions their Lordships must, in the first instance, examine the provisions of the Act itself.

The Act is intituled "An Act to enable the Government to Levy a Separate Cess for the use of Water supplied for Irrigation Purposes in certain Cases." It recites that in several districts of the Madras Presidency large expenditure out of Government funds has been and is still being incurred in the construction and improvement of works of irrigation and drainage to the great advantage of the country and of proprietors and tenants of land, and that it is right and proper that a fit return should in all cases alike be made to Government on account of the increased profits derivable from lands irrigated by such works. By S. 1 of the Act as amended by the Madras Act, No. V of 1900, it is provided (*inter alia*) that whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank, or work belonging to or constructed by Government, it shall be lawful for the Government to levy at pleasure on the land so irrigated a separate cess for such water, and the Government may prescribe the rules under which, and the rates at which, such water cess as aforesaid shall be levied, and alter and amend the same from time to time. Then follow two provisoes, the first for the protection of zemindars, inamdars, or any other description of landholder not holding under Ryotwari settlement; and the second, for the protection of landholders under Ryotwari settlement. Under the first proviso, where a zemindar, inamdar, or other landholder not holding under Ryotwari settlement is, by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under the Act is to be imposed for water supplied to the extent of this right and no more. Under the second proviso, no cess is to be levied under the Act in respect of land held under Ryotwari settlement which is classified and assessed as wet unless the same be irrigated by using, without authority, water from any source thereinbefore mentioned and such source is different from, or in addition to, that which has been assigned by the Revenue authorities or adjudged by a competent Civil Court as the source of irrigation of such land.

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It cannot be denied that, with regard to the true meaning and construction of this Act, various difficulties arise. In the first place, it might have been expected from the recitals that the cess which the Government is authorised to levy would have been confined to a cess in the case of land irrigated from works constructed or improved by Government and would have been in some way proportional to the extra profits derivable by reason of such irrigation. But this does not seem to be the effect of the first section. The amount of the cess is discretionary and, as a matter of fact, it is levied on the basis of the area irrigated, irrespective of actual or possible profits. Moreover, it appears to be leviable whether the Government has or has not spent money in constructing or improving the source from which the water is supplied. If, for example, a riparian owner irrigates his land with water derived from a river or stream of which it can be truly said that it is a river or stream belonging to the Government, a cess would appear to be leviable even though the Government had never spent a single rupee in improving he source of supply. If, in order to avoid this result, reliance were placed on the first proviso, the question would arise whether it were possible to imply some engagement with the Government arising out of the natural or prescriptive right of the riparian owner.

In the next place, it is by no means easy to say what is meant by river or stream "belonging to the Government." The same expression in an Act of the United Kingdom would probably connote a Government ownership of the bed or the banks of the river; but it is quite possible that the law of the Madras Presidency recognises some proprietary right on the part of Government in the water flowing in rivers and streams. The law of the Madras Presidency as to rivers and streams certainly differs in some respects from English law (*Fischer* v. *Secretary of State for India* [1]). Further, the Madras Act, No. III of 1905, appears to enact that (*inter alia*) all standing and flowing water, not the property of private individuals, is the property of Government, but subject to the natural and easement rights of other landholders. If this section be relied on, it is a nice problem whether a riparian owner, who is exercising his natural or prescriptive right of taking water from a natural stream for purposes of

1. (1908) I. L. R. 32 M. 141=19 M. L. J. 131.

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irrigation, is taking water from a stream belonging to the Government within the meaning of the Cess Act? If he is, the natural and prescriptive rights of riparian owners are seriously diminished by the Act and, where the Government have not expended money in improving the natural stream, apparently without any sort of *quid pro quo*.

Lastly, it is by no means easy to decide as to the class of case which the first proviso is intended to meet. Their Lordships cannot accept the contention that the proviso applies only where there is an express contract that the supply to which the person claiming the protection of the proviso is entitled shall be free from anything in the nature of a future tax. It is enough, in their Lordships' opinion, that the person relying on the proviso shall show an engagement between the Government and himself or his predecessors in title by virtue of which he is, in fact, entitled to water for irrigation (1) from the source from which he is actually irrigating his lands; (2) to the amount of water actually used for such irrigation; and (3) without being subject to a "separate charge" for such irrigation. But there is a difficulty in arriving at what is the meaning of the expression "free of separate charge." A provision that the person relying on the proviso must prove that he is already being charged for the supply would be intelligible, for in that case by the imposition of a cess, he would be charged twice for the same thing. But this is not what he has to prove. Indeed, he has to prove the contrary. He must prove either that he is not charged already for the supply, or that the charge, if any, is not a "separate charge."

Their Lordships think that the real object of the proviso may be found in the following considerations: The cess under the Act is leviable on the land which is irrigated. It is therefore in the nature of a land tax, and by S. 2 is recoverable in the same manner as arrears of land revenue. Now the permanent land settlement in the Madras Presidency (as in the Presidency of Bengal) proceeded on the footing that, whatever may have been the interest of the zemindars and other landholders prior to the British occupation, the Government would grant to them and their heirs "a permanent property in their land for all time to come, and would fix for ever a moderate assessment of public revenue on such lands the amount of which should never be liable to be increased under any circumstances.

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(See Section 1 of Madras Regulations No. XXV of 1802.) The Government, therefore, came under an obligation not to raise the jumma, or as it is sometimes called, the peishcush, fixed at the permanent settlement in respect of the lands then granted. Under these circumstances the Government could not impose a cess for the use of water the right to use which was appurtenant to the land in respect of which the jumma was payable without in fact, if not in name, increasing the amount of such jumma, and thus committing a breach of the obligation undertaken at the time of the permanent settlement. If the right to use the water was paid for separately the case would be different. The existence of a separate charge would show that no payment for the use of the water was included in the jumma, and the imposition of a water cess, though it might increase the separate charge would not increase the jumma. Its imposition would not be a breach of the Government's obligation.

That the object of the first proviso was to safeguard the obligation not to increase the jumma is borne out by a consideration of the second proviso. The incidents of Ryotwari tenure are governed by custom, and include a right to receive from the owner of the soil (whether the Government or a private individual) a supply of water sufficient for the irrigation of the mamul wet lands comprised in each holding. The owner of the soil is, on his part, entitled to his customary share in the actual produce. It has, however, long been the practice on Government estates to make periodical settlements with the Ryots whereby the Government's share in the produce is commuted for a fixed annual payment, in assessing which the wet lands are separately classified. The annual payment is incapable of increase during the period for which the settlement is made. It is paid (*inter alia*) for the Ryot's right to water for irrigating his mamul wet lands, and would be increased if a new cess were imposed for this supply. The second proviso seems to be intended to provide against this result.

Their Lordships therefore conclude that whether or not there are other possible casus which the first proviso was intended to meet, it at least covers the case of engagements with the Government arising out of the permanent settlement. If by virtue of such settlement a zemindar is entitled to take and use water from any such source of supply as mentioned in the Cess Act, and this

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right is part of or appurtenant to the property in respect of which he pays a single jumma or peishcush, no cess can be levied under the Act in respect of the water which he is so entitled to take and use.

The Appellants claim the benefit of the first proviso, relying mainly on the engagement with the Government constituted by the permanent settlement of the Urlam Estate, but as to the inam lands in some degree also on engagements arising out of the inam grants or subsequent inam settlements. Obviously if their claim be well-founded the appeal must succeed on this ground alone, and it will be unnecessary for their Lordships to deal with the other questions which have been argued. Their Lordships therefore propose to consider in the first instance whether, and to what extent, the appellants are within the first proviso. That they are to some extent within the proviso was admitted in the Courts below, and was not really contested before their Lordships' Board. The respondent's contention was really this: The appellants, he said, may well be entitled without separate charge to certain water rights under the permanent settlement or in respect to inam lands under the inam grants or subsequent inam settlements, but those rights must in all cases be limited by the mamul prevailing when the particular settlement or grant relied on was made. The mamul did not extend to a second crop on any of the zeraiti lands in the Urlam Estate or to the inam lands in the village of Venkatapuram, nor did it extend to any wet land which was not mamul wet at the date of the settlement or grant on which reliance is placed. The Government has not charged cess for any water taken or used in accordance with the mamul. If they have done so they will refund the amount so charged; but they claim the right to charge cess for water taken in excess of the mamul whether for the second crop on mamul wet land or for any crop on land in excess of the mamul wet. This contention depends for its validity on the true effect of the particular settlement or grant upon which reliance is placed, and the true effect of such settlement or grant depends upon its terms taken in connection with the circumstances existing when it was made. Their Lordships will first consider the effect of the permanent settlement of the zemindari or estate of Urlam. They will postpone for the present all questions as to the inams.

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The Urlam Estate had no separate existence prior to the permanent settlement. Till then it was part of a larger district consisting of (1) haveli lands and (2) lands belonging to a religious community of Brahmins known as the Agraharam, such last-mentioned lands being held under inam grants. This district was bounded in part by the River Vamsadhara, and some time prior to the permanent settlement extensive works had been carried out for the purpose of supplying the district with water from the river. These works included four main channels known as Jalmour, Polaki, Lukulam, and Mobagam. The first three appear to have been cut by one Ramaradhanulu, a member of the Agraharam, who was also a renter under Government of the whole or the greater portion of the haveli lands within the district. The origin of the Mobagam channel is lost in obscurity. Each channel derived its water by means of weirs and sluices from the River Vamsadhara, and the water was distributed throughout the district by means of branch channels and subsidiary channels ending in many instances in village tanks or reservoirs. The prosperity of the district depended to a great extent on the supply of water thus obtained.

In 1802 the Government proceeded to carve out of this district four estates or zemindaris, subsequently known as Jalmour, Nagarakatakam, Urlam and Polaki, and to assess the permanent land revenue or jumma to be paid for each estate. Having assessed the permanent jumma the Government in July 1803 caused these four estates or zemindaris to be put up for public auction. At the auction all four estates were sold. It appears that in the advertisement announcing the sale particular attention was called to the fact that the village tanks or reservoirs had been repaired or improved for the benefit of purchasers, and particular stress laid on the benefit which the country would derive from the improvement of the properties offered for sale. In due course after the sale each purchaser obtained a sanad, but none of these sanads is now forthcoming. The corresponding kabuliyat in the case of the Urlam Estate is, however, in evidence. It refers to the Urlam sanad, the terms of which must have corresponded in all material particulars with those of the kabuliyat. Their Lordships see no reason to suppose that the other sanads were not framed on the same lines.

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The Urlam kabuliyat does not mention any water rights. It does not even refer to the existence of main or branch or subsidiary channels or of the tanks or reservoirs in the several villages. It mentions the advantages likely to accrue to the zemindar and his people by the public revenue being put on a permanent foundation, and it refers to the jumma payable for the zemindari as a permanent annual tax, of which no increase can be ever made, whatever changes or improvements the interests or pleasure of the zemindar may lead him to introduce in his zemindari. It contains also an agreement by the zemindar to enter into engagements with his ryots in manner provided by S. 14 of the Madras Regulation XXV of 1802, and to encourage such ryots to improve and extend the cultivation of the land. Subject to his observing the conditions of the kabuliyat, the zemindar is authorised to hold the zemindari in perpetuity for himself and his heirs.

Their Lordships regret that they have not been supplied with a map or plan showing the boundaries of the four zemindaris, the subject of the auction sale, their position with regard to each other, and the extent to which the four main channels with their numerous branches or subsidiary channels lay within the boundaries of each estate. It appears, however, to be common ground that the four zemindaris together comprised all the haveli lands within the district, including those contiguous to the river Vamsadhara, together with the head sluices of the four channels, and, if the principles of English law governing the grant of land bounded by a stream or river be applicable in the Madras Presidency, they comprised also the river bed *usque ad medium filum* and the weirs by which water was diverted from the river into these main channels.

Three of the four zemindaris, namely, Jalmour, Nagarakatakam, and Urlam were sold in 1809-10 in order to raise arrears of land revenue. Two of them, namely, Jalmour and Nagarakatakam were bought by the Government, and thenceforward became Government land subject to ryotwari tenure. The third, namely, Urlam, was bought at the same time by the plaintiff's predecessor in title. The sluice gates of the Mobagam channel were admittedly in the Urlam zemindari. The sluice gates of the Polaki channel were originally in Urlam, but appear to have been removed about 1824 to the Government village of Parlam, which

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would thus seem to have been within Jalmour or Nagarakatakam, for the Government did not acquire the Polaki zemindari till 1850. The sluice gates of the Jalmour channel were admittedly in the Jalmour zemindari; those of Lukulam are now admittedly on Government lands, but it is impossible to determine on the evidence in which zemindari they were comprised at the permanent settlement. They were certainly not comprised in Urlam.

The Jalmour main channel does not pass through any village in the Urlam zemindari. From it, however, some 130 acres of Urlam derive their water supply either by regulators in the main or branch channels, or by subsidiary channels through the estate, ending in one instance at least in a village tank. The Jalmour channel also now irrigates some 6,000 acres of Government land and some 1,100 acres belonging to the Agraharam. The Lukulam, Polaki and Mobagam main channels all pass for considerable distances through the Urlam zemindari. Lukulam now supplies water to some 1,000 acres of Urlam land, some 500 acres of Government land, and some 2,500 acres belonging to the Agraharam. Polaki now supplies water to some 500 acres of Urlam, some 10,000 acres belonging to the Government, and some 1,500 acres belonging to the Agraharam. Mobagam now supplies water to some 3,500 acres of Urlam and some 500 acres of Government land. No doubt most, if not all, of the Government lands now supplied with water from these four channels were originally comprised within the zemindaris of Jalmour, Polaki, or Nagarakatakam. Moreover, though the area of land under each of the four channels may have increased since the permanent settlement, the general purpose which each channel served at the date of the permanent settlement can, in their Lordships' opinion, be properly inferred from the facts as they now exist.

Before proceeding further, it may be useful to summarise the conclusions arrived at by the Subordinate (District ?) Judge and the High Court respectively. The Subordinate (District ?) Judge held that the Vamsadhara river was not a river belonging to the Government within the meaning of the Cess Act. He held, however, that the head sluices of the Jalmour, Polaki, and Lukulam channels, with the initial portions of the channels themselves, belonged to Government, and must be looked on as the source of supply of water for the lower portions of the whole system of irrigation

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dependent upon them, and it was immaterial that parts of these main channels, or the branch or subsidiary channels leading therefrom, or the tanks or reservoirs in which some of the subsidiary channels ended, belonged to the owners of the villages through which they passed or in which they were situate. He held further that the rights of the owners of these villages were confined to using the water in the main branch and subsidiary channels and tanks or reservoirs for the purposes for which the same had been used at the time of the permanent settlement. They could not, therefore, without the consent of the owner of the head sluices and the initial portions of the channels, lawfully use the water for a second crop unless second crops were within the then existing mamul, or extend wet cultivation beyond the area of the then mamul wet. On the other hand, he held, with regard to the Mobagam channel, that its head sluice and its initial portion did not belong to Government but to the owner of the Urlam zemindari, who had an unlimited right to the use of the water in the channel subject to the mamul rights of others. These findings appear to involve the following propositions:—

First—The effect of the permanent settlement was to vest the head sluices of the four channels, the channels themselves, and all branch and subsidiary channels and tanks or reservoirs in the zemindars, through or within whose zemindaris the same respectively passed or were situate.

Second.—The zemindars who thus acquired the head sluices, with the initial portions of the channels themselves, became entitled to take into the channels from the river as much water as they chose, subject only to the rights of lower riparian owners on the river, and as little as they chose, subject to the obligation to send down each channel sufficient water to satisfy the mamul rights of persons entitled to water from the system supplied by each channel.

Third.—If the owner of the head sluice or the initial portion of any channel sent down more water than would satisfy those mamul rights, the proprietors of other parts of the channels or of the branch or subsidiary channels or the tanks or reservoirs were not entitled to make use of the surplus, or if they were entitled to make use of the surplus, were not so entitled by virtue of the sanads granted at the permanent settlement.

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Fourth.—It was merely the accident of the Government having subsequently purchased the zemindaris of Jalmour, Polaki, and Nagarakatakam which in any way brought their powers under the Cess Act into play. Had those zemindaris still existed in private ownership, each of these channels would have been precisely in the same position as the Mobagam channel.

The High Court disagreed with the Subordinate Judge on the question as to the Vamsadhara river. They held that it belonged to Government, and must, for the purposes of the Cess Act, be looked on as the source of supply of the whole system of irrigation dependent on the four main channels. They agreed with the Subordinate Judge that the effect of the permanent settlement was to vest the head sluices, the four channels, and all branch and subsidiary channels, and the tanks or reservoirs, in the zemindars, through or within whose zemindaris the same respectively passed or were situate. They held that the water rights of the owners of the head sluices and the initial portions of the channels, as of all other persons entitled to water from the system supplied by these channels, were confined to the mamuls at the date of the permanent settlement, and that the Government could therefore charge water cess in respect of water used in excess of the then mamul, either for a second crop where no second crop had been customary, or for irrigating land in excess of the original wet area. These findings appear to involve the propositions: (1) that the easements of taking water from the Vamsadhara conferred by the sanads were confined to taking sufficient water to satisfy the mamul rights, and (2) that, if without objection from the Government, more water were taken, the proprietors of the various portions of the main channels, branch or subsidiary channels, or of the tanks or reservoirs, were not entitled to make use of the surplus, or if they were entitled to make use of the surplus, were not so entitled by virtue of the sanads granted at the permanent settlement.

In their Lordships' opinion, there can be no real doubt that the Courts below were right in holding that the effect of the permanent settlement was to vest the channels, with their head sluices and branch and subsidiary channels, and the tanks or reservoirs, in the zemindars through or within whose zemindaris the same respectively passed or were situate. As pointed out by the High Court, this would be in full accordance with the policy

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enunciated in the well-known Fifth Report. Indeed, no reason can be suggested for implying in favour of the Government any reservation of this system of irrigation. It is not shown that the Government were retaining any of the land thereby irrigated. They were parting, or had parted, with (if not the whole), at any rate, the greater portion of such land. If they retained any, it would be enough to imply a reservation of water rights in respect of the land so retained. It is true that, on this footing, disputes were not unlikely to arise (indeed, they did arise) as to the relative rights of the several zemindars or their ryots. But the probability of such disputes is not sufficient reason for implying a reservation. They could not concern the Government, and were capable of settlement by arrangement, or through the medium of the Courts. On the other hand, the reservation of the main channels and other works would certainly have raised questions as to the Government's liability for repairs or otherwise. But, while agreeing in this respect with the conclusion of the Courts below, their Lordships do not think that such Courts attached sufficient importance to that conclusion. In their opinion, the fact that the ownership of the channels and works passed under the several sanads is of the utmost importance in ascertaining the water rights thereby conferred.

Assuming that the Vamsadhara river belongs to Government, the case may be looked on in this way. The owner of a river and of contiguous land through which passes a channel constructed for irrigation purposes and supplied with water from the river, grants the contiguous land together with the channel. Obviously some right or easement of taking water from the river must pass. The only question is as to the measure of this right. In their Lordships' opinion, the right must be measured by the physical conditions, such as the size of the channel, or the nature and extent of the sluices and weirs governing the amount of water which enters the channel, and not by the purposes for which the grantor or his tenants have been accustomed to use water from the channel prior to the date of the grant. The water in the channels may never have been used by the grantor or his tenants at all, but it would be absurd to hold on that account that no easement or right of taking water from the river passed by the grant. The case would have been very different if the contiguous land had been granted reserving the channel. In

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that case if any easement passed, it would be an easement in respect of which the channel and not the river was the servient tenement, and if no water had been or were being used by the grantor or his tenants, it may well be that there were no existing physical conditions by which the principle of continuous and apparent easements could be brought into play. In such a case no easement or right to use water from the channels would pass under the grant.

It follows from these considerations that the zemindar in whose estate the head sluices and initial portions of each of the four channels in question were situate obtained under his sanad the right to take water from the Vamsadhara (assuming it belonged to the Government) limited only by the size of the channel and the nature of the sluices and works by which water was diverted from the river into the channel. The Government could not complain if the amount of water taken were within this limit. After the water was lawfully taken into the channel, the Government had nothing further to do with the matter; the subsequent distribution and use depended on the rights *inter se* of the zemindar and others entitled to take water from the system supplied by the channels in question.

It may be observed that the Government could not grant the zemindaris otherwise than subject to the customary rights of the ryot cultivators and the rights of all holders of inams under existing inam grants. The zemindars in whose favour the sanads were made took therefore subject to those rights. In other respects the rights *inter se* of the several zemindars under their sanads would, in their Lordships' opinion, be analogous to the rights of upper and lower riparian owners on a natural stream. Each would be entitled to have the full supply taken into the main channels. Each would be entitled to make use of the water in any channel through his own lands or in tanks or reservoirs in villages within his estate, but in exercising this right each would be bound to have due regard to the existence not only of the rights of the ryots and inamdars in the lower portions of the irrigation system, but to the rights similar to his own of the other zemindars in whose estates any portion of the system was situate. Further, each zemindar might be entitled to take water from a channel or branch

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channel in the estate of the others if at the time of the settlement and on the principle of continuous and apparent easements circumstances pointed to the intention to create such a right. It follows that each zemindar could (subject as aforesaid) legally authorise his ryots to use water to the use of which he was himself entitled for the growth of second crops on their holdings or for increasing the area of land within their boundary for the time being under wet cultivation. In taking advantage of such authorisation the ryots would be entitled to rely on the engagements with the Government arising out of the permanent settlement to the same extent as the zemindar himself. All these zemindari rights would moreover arise under and be dependent upon engagements with the Government embodied in the sanads granted at the permanent settlement, and payment for them would be included in the jummas.

Assuming, on the other hand, that the river Vamsadhara does not belong to the Government, the right of taking water from it into each of the four channels could not depend on any easement created by virtue of the permanent settlement. It would depend in part upon the natural rights of riparian owners and in part on prescriptive rights existing at the date of, and passing under, the sanads, or acquired since the sanads were granted. Moreover, in the case of these prescriptive rights, it would be the lands of the lower riparian owners and not the river itself which would constitute the servient tenement. The Government would have even less interest in the amount of water taken into the channels than if the river belonged to it and constituted the servient tenement. The rights *inter se*, however, of the grantees of the four zemindaris would be, for all practical purposes, the same. The rights of the proprietor of Urlam under his sanad could not in any case be affected by the subsequent purchase by the Government of the three other zemindaris.

The construction of the sanads in the way their Lordships construe them has the advantage of being in ample accord with the known policy and objects of the permanent settlement. The uncertainty as to the ownership of the soil and the liability to arbitratory and varying assessments to the land revenue had (to use the language of Regulation XXV of 1802) "obstructed the progress of agriculture, population, and wealth." The policy was

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to encourage such progress, and accordingly we find in the Kabulyat of the Urlam Estate (which is admittedly a common form Kabulyat) an undertaking by the zemindar to encourage his ryots to extend and improve the cultivation of the land. The same point is emphasised in the advertisement for the sale at which the zemindaris were sold. In this part of India, water is essential for improvements in agriculture. These facts coupled with the actual grant to the zemindars of the channels, branch channels, and works, constituting an extensive system of irrigation which must have been created for the benefit of the lands comprising the several zemindari estates, manifests, in their Lordships' opinion an intention that the water therefrom should be used to the utmost extent for the purpose of improving the estates, and increasing the population or wealth of the district. On the construction of the sanads adopted by the High Court, water could not properly be used for any such purpose. Indeed, though the channels, branch channels, and works constituting the irrigation system were included in the grants, no right to use such system passed at all. For the grants were necessarily subject to the existing rights of the ryots and inamdars, and according to the decision of the High Court it was only in respect of these rights that any water could be used from the system.

Both the Courts below appear to have arrived at the conclusion that the water rights which passed by the sanads were limited by the mamuls at the permanent settlement for the following reasons: The assessment of the permanent jumma in the case of each zemindari was arrived at on the basis of the then actual produce of the land. An annual value was placed on this produce, and a proportion of the annual value was fixed as the jumma or peishcush. The water actually used in growing the annual produce thus comes within the assessment. The use of the water for other purposes was not assessed at all, and therefore does not pass by the sanad grants. In their Lordships' opinion this process of reasoning is fallacious on two grounds: It does not follow that the assessors in fixing the proportion of the annual value which should constitute the jumma or peishcush did not take into full account the possibility of improving the cultivation of the lands, the subject of the grant, by means of the irrigation system comprised therein. The jumma or peishcush was in the case of each of the zemindaris in question admittedly high. Again, it

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does not follow that all which is not brought into account in fixing the jumma or peishcush is excluded from the grant. On this footing many things of great importance to the enjoyment of a zemindari would not pass by a zemindari grant, for example, waste land, farm buildings, tanks, or, in the present case, irrigation channels. As pointed out in the recent case of *Rajah Ranjit Singh Bahadur* v. *Srimati Kali Dasi Debi and others*[1] the property taken into account in arriving at the jumma is by no means necessarily the same as the property upon which the jumma is chargeable, and all that is chargeable with the jumma or peishcush is included in the grant.

There being no evidence whatever that more water is being taken from the river than would be justified by the sanads—construed as in their Lordships' opinion they ought to be construed—it follows that the appellants must succeed in respect of the zeraiti lands on which the cesses in dispute were levied. It remains to consider the case of the inam lands.

Inams are Government grants subject to quit-rents, and in some instances to services. They were not assessed for land revenue at the date of the permanent settlement. The inams now in question existed at the date of the permanent settlement, and the quit-rents payable in respect thereof were by the Urlam sanad made part of the assets of the Urlam Estate. They are constantly referred to in the inam records as within the Urlam Estate. They were sometimes since acquired by the plaintiff or her predecessors. The appellants, therefore, are the inamdars as well as the persons entitled to the quit-rents under the Urlam sanad. The water for the use of which the cesses in dispute were levied was used by the zemindar on inams which belonged to him and were within his zemindari. The question is whether the zemindar was entitled so to use this water. In their Lordships' opinion, the answer to this question must be in the affirmative. The only persons who could complain of such use would be persons whose rights to take water from the irrigation system in question were interfered with by such user, and there appears to be no such person. If the cess were levied on the plaintiff as Urlam zemindar, he brings himself within the first proviso by virtue of the engagement with Government arising out of his zemindari sanad. If the cess were levied upon

1. (1917) 32 M. L. J. 565.

him as inamdar, he can rely on the same engagement to the same extent as could a tenant of zemindari land authorised by the zemindar to use the water. It is, therefore, in their Lordships' opinion; unnecessary to consider the terms of the original inam grants or the effect of any subsequent inam settlement. The appellants must succeed also as to the inam lands.

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The result is that the appeal succeeds, both as to zeraiti and inam lands. The right thing will be to discharge the orders of the District Judge and the High Court, and to declare that the rights of the Zemindar of Urlam under the Urlam sanad to irrigate the Urlam Estate (including inams therein) from the Jalmour, Polaki, Lukulam, and Mobagam channels or their branches, is not limited by any mamul, and that such zemindar, not being subject to any separate charge for such irrigation, is within the protection of the first proviso to S. 1 of the Cess Act No. VII of 1865, as amended by the Act No. V of 1900. The appellants will be entitled to recover the amounts paid under protest with interest at 6 per cent. per annum and their costs here and in the Courts below. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for Appellants :—*Douglas Grant.*

Solicitors for Respondent :—*The Solicitors, India Office.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE SADASIVA AIYAR.

Pana Lana Ana Alagappa Chettiar and another ... *Appellants* * (*Plaintiffs 2 to 4*).

v.

Ravanna Mana Pana Chana Muthiah Chettiar ... *Respondent* (*Defendant*).

Alagappa Chettiar v. Muthiah Chettiar

Religious Endowments Act, Ss. 14 and 18—Suit instituted by four persons with leave of Court—Death of one pendente lite—*Suit, if abates.*

A suit instituted under S. 14 of the Religious Endowments Act by four persons with leave of the Court under S. 18 of the Act, does not abate by reason of the death of one of the plaintiffs during the pendency of such suit.

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* A. S. No. 44 of 1916. 25th April, 1916.

Alagappa Chettiar v. Muthiah Chettiar.

Venkatesha Malla v. *Ramayya Hegade* [1], distinguished.

Parameswaran Munpee v. *Narayanan Nambodri* [2], referred to.

Appeal against the decree of the District Court of Ramnad at Madura in O. S. No. 22 of 1913.

G. S. Ramachandra Aiyar for Appellants.

A. Krishnaswami Aiyar for Respondents.

The Court delivered the following

Ayling, J.

Judgments:—*Ayling, J.*:—The suit from which this appeal arises was instituted under S. 14, Religious Endowments Act XX of 1863, by four persons, who had obtained leave of the Court under S. 18 of the same. Subsequent to its institution, one of these persons died; and the District Judge has dismissed the suit on the single ground that it is not competent to the three survivors to maintain it, it being "essential that all the donees of the power (to institute a suit) conferred by the Court should jointly exercise that power right up to the finish of the suit." The surviving plaintiffs appeal.

The chief authority relied on by the District Judge is that of *Venkatesha Malla* v. *Ramayya Hegade* [1], in which it was held that where sanction was given under S. 18 of the Religious Endowments Act to two men, it was not open to one of them alone to institute the suit under that sanction. It may be pointed out at once that this ruling does not necessarily cover the present case, in which the suit was validly instituted by all the persons who obtained leave to sue, but one of them subsequently died. It does not necessarily follow that a validly instituted suit abates for this reason. Another judgment of this Court quoted in support of the Lower Court's decree, *Maddala Bagavannarayana* v. *Vadapalli Perumalacharyulu* [3], also deals with a case in which the institution was itself defective (in the above sense): and the only authority brought to our notice in support of the abatement, is *Chhabile Ram* v. *Durga Prasad* [4], which was expressly dissented from in a recent case of this Court, *Parameswaran Mumpee* v. *Narayanan Nambodri* [2]. All the last three cases were of suits instituted

1 (1914) I. L. R 38 M. 1192=27 M. L. J. 241

2. (1916) I. L. R 40 M. 110=31 M. L. J. 279.

3. (1915) 29 M. L. J. 231.

4. (1915) I. L. R. 37 A. 296.

under S. 92, Civil Procedure Code; but as I shall endeavour to show presently, the difference between the two sections is in the present appellants' favour.

S. 18 of the Religious Endowments Act is very similar to S. 195 of the Code of Criminal Procedure. In each, the Courts are expressly forbidden to entertain a complaint or suit, unless express sanction or leave for its institution has been previously obtained. The grant of the sanction or leave in each case removes the bar to the Court taking cognizance of the matter; and once that bar is removed, it is not easy to see how either of the two sections can have further effect. In the case of S. 195 of the Code of Criminal Procedure the complaint may be filed by a different person altogether from the person who applied for the sanction (Vide *In re Thathayya* [1]): and though it is not necessary for us to go so far as the present case, I do not see why the same should not hold good in the case of leave granted under S. 18 of the Religious Endowments Act. With all respect to the learned Judges who decided *Venkatesha Malia* v. *Ramayya Hegadi* [2], the wording of S. 18 of the Religious Endowments Act seems to afford no warrant for the consideration by the Court of the personality of the applicant. The duty of the Court is specifically defined as the determinations of whether there are sufficient *prima facie* grounds for the institution of the suit. In dealing with applications under S. 195 of the Code of Criminal Procedure, Courts do, not uncommonly, bear in mind the personality of the applicant and his probable motives, although S. 195 is, in this respect, quite general in its terms, and does not attempt to define the matters for the Court's determination. Nevertheless, as already stated, a sanction granted to one person may be utilised by another. Section 92 of the Code of Civil Procedure is different. It expressly authorises the institution of a suit by "two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General." This wording certainly supports the view that the persons who institute the suit must be identical with those who obtained the sanction.

Under S. 14 of the Religious Endowments Act, on the contrary, any person or persons interested may sue; and S. 18 merely interposes an independent condition that the suit shall not be entertained unless leave has been previously granted on application

1. (1888) I. L. R. 12 M. 47. 2. (1914) I. L. R. 38 M. 1193=27 M. L. J. 241.

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—but without indicating in any way by whom the application should be made.

There seems to me, therefore, no need to adopt the District Judge's very narrow view of the section : and where the District Court has, on due consideration, decided that there are sufficient *prima facie* grounds for the institution of a suit against trustees of religious endowments it is undesirable in the public interest that unnecessary obstacles should be thrown in the way of its prosecution.

I would set aside the decree of the District Court and remand the suit for disposal on its merits. Costs in this Court should be costs in the cause.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J. :—I should like to reserve my opinion on the question whether when leave is granted to A under S. 18 of Act XX of 1863 to institute a suit, B could institute that suit under S. 14.

But I entirely agree with my learned brother that there is nothing in S. 18 which can be construed as putting an end to the suit after it is once legally instituted, simply because one of several persons who obtained the leave under S. 18 died during the pendency of the suit. I think that the general provisions of the Civil Procedure Code become applicable as much to a suit brought in the Special Court mentioned in S. 14 of the Religious Endowments Act after the first step, namely, the institution of the suit, has taken place, as to a suit brought under S. 92, Civil Procedure Code, except that a certain special or rather supplemental provision regarding reference to arbitration (See S. 16 of the Religious Endowments Act) is also applicable to the former case and the Court is given express powers to award certain named reliefs in its decree to a suit under S. 92, Civil Procedure Code. (See also *Parameswaran Mumpee* v. *Narayanan Nambudri*, [1] and *Varadayya Chetti* v. *Munusami Chetti* [2].)

A suit under S. 14 of Act XX of 1863 is, in my opinion, as much a representative suit as one brought under S. 92 of the Civil Procedure Code or some of the suits under O. 1, R. 8 of that Code, as it is equally brought in and as it affects the rights of all those interested in the religious endowment. All such interested persons become, in the eye of the law, parties to such a suit and the death of one or more of them cannot cause the suit

1. (1916) I L R 40 M. 110=31 M. L. J. 279. 2. (1911) 10 M. L. T. 514.

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to abate nor would it prevent the suit from being heard till "its finish" after it has been once properly and legally instituted, unless perhaps in the almost impossible contingency of all the persons interested ceasing to exist in this world by death or by wholesale apostacy. I agree in the order proposed by my learned brother.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE SESHAGIRI AIYAR.

Appavu Rowther *alias* Kadirsa Rowther. *Appellant* (Defendant).*

v.

Seeni Rowther *alias* Muhammad Abdul Kadir Rowther ... *Respondent (Plaintiff).*

Appavu Rowther v. Seeni Rowther

Arbitration—Civil Procedure Code, 2nd Schedule, Rules 18, 22—Specific Relief Act, S. 21—Agreement to refer disputes to certain arbitrators—Subsequent suit on the same subject matter—Award pending the suit—Validity of—Whether Court can pass a decree in accordance with the award.

Where the parties agreed to refer their disputes to certain arbitrators and for some time nothing was done under the reference and the plaintiff sent a notice revoking the arbitration and subsequently filed a suit ignoring the reference and pending the suit, the arbitrators passed the award, the Court cannot pass a decree in accordance with such award. On the filing of the suit, the arbitrators became *functus officio*, consequently their award is *ultra vires*, their powers and the Court acts without jurisdiction in passing a decree embodying the terms of the award.

Appeal against the order of the Court of the Subordinate Judge of Madura, dated 19th January 1916 in O. S. No. 122 of 1913.

K. V. Krishnaswami Aiyar and *K. V. Sesha Aiyangar* for Appellant.

L. A. Govindaraghava Aiyar and *A. Srirangachariar* for Respondent.

The Court delivered the following

Judgment :—The facts which have led up to this appeal may be thus shortly stated. The appellant and the respondent agreed to refer their disputes to the decision of certain arbitrators on the 20th of August 1912, (Ex. I and I-a). For sometime nothing was done under the reference. The appellant sent a notice revoking the arbitration and subsequently filed a suit to enforce his rights

* A. A. O. No. 90 of 1916. 14th March, 1917.

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ignoring the reference altogether. This was on the 25th of August 1913 (O. S. No. 77 of 1913). While the suit was pending, the arbitrators gave the award on the 1st of October 1913. Thereupon on the 18th December 1913, the respondent filed O. S. No. 122 of 1913 for a decree in terms of the award. The Lower Court passed a decree as prayed for. Mr. K. V. Krishnaswami Aiyar, the learned vakil for the appellant has raised various objections to the decree. The only one which requires consideration is the contention that on the filing of O. S. No. 77 of 1913, the arbitrators became *functus officio,* that consequently their award was *ultra vires,* their powers and that the Court acted without jurisdiction in passing a decree embodying the terms of the award.

We think this objection is well founded. A short resume of the legislative provisions on this question is necessary to appreciate the appellant's contention. Under S. 28 of the Contract Act, it was not ordinarily open to parties to ignore the Courts of the country and to set up a tribunal for deciding their disputes. One exception was recognised to the effect that if the parties had agreed to refer their disputes to arbitration, the existence of the agreement shall be a bar to seeking redress in the ordinary Courts. The section also recognised the right of one of the parties to sue for the specific performance of the agreement to refer.

Then came the Specific Relief Act of 1877 which by S. 21 took away the right to sue for the specific enforcement of the contract, but preserved the right to the party who was willing to abide by the agreement, to object to the trial of a suit filed by the other party.

Lastly, we have S. 22 of the 2nd Schedule to the Code of Civil Procedure which has repealed that portion of S. 21 of the Specific Relief Act which enabled the defendant to plead the agreement to refer as a bar to the suit. The result of these various legislative provisions is to bring the Indian Law into conformity with the English Law on the subject. The provisions of the Indian Arbitration Act which apply to Presidency Towns and to Karachi are to the same effect.

In our opinion the intent to be gathered from these acts is that the right of a party to seek the assistance of the properly constituted Courts of the realm are unrestricted. The right inhering in a suitor to sue is preserved intact,

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In order to provide against the contumacious conduct of a plaintiff who had agreed to refer but who wants to resile from it by instituting a suit, S. 18 of the Second Schedule has been introduced. Under that section if the Court is apprised that an agreement to refer was entered into, it may stay the trial of the suit. In a given case, the Court may consider that the arbitrators would be able to decide the case far more efficaciously than the Court itself. In such a case, the Court may ask the arbitrator to give his decision. But the discretion is in the Court; the paramount idea being that a tribunal constituted by the parties should not come in conflict or usurp the function of the tribunal which the sovereign has provided.

This view receives support from the judgment of Fletcher Moulton, L. J., in *Doleman and Sons* v. *Ossett Corporation* [1]. The learned Lord Justice points out that as soon as an action is brought in respect of the subject-matter of the reference, the arbitrators become *functus officio*. It is also pointed out that the case of an award having been given prior to the suit would be different, for then a new right would have been substituted for the original one to enforce which a suit can be instituted. Mr. L. A. Govindaraghava Aiyar contended that the language of S. 18 of the Second Schedule implies that the arbitrator's jurisdiction ceases only on the settlement of the issues in the suit, because it is open to the defendant till then to ask for stay of the suit. We are unable to accept this contention. The time limit for filing objections should not be construed as validating the reference till then.

The learned vakil for the respondent also argued that his client had referred to the existence of the agreement to refer and to the award passed, in his written statement, and that further steps should have been taken by the Court with reference to these contentions. He also contended that the adjournment of the trial practically amounted to a stay of the suit. On examining the B diary we are satisfied that the trial was never stayed as contemplated by S. 18 of the Second Schedule. The decision in *Ramachandra Pal* v. *Krishna Lal Pal*, [2] was on S. 21 of the Specific Relief Act before the last 37 words were repealed. On the other hand *Sheo Babu* v. *Udit Narain* [3] supports the view we have taken.

1. (1912) 3 K. B. 257.
2. (1912) 17 C. W. N. 351.
3. (1914) 12 A. L. J. 157.

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We must therefore set aside the decree passed in the respondent's suit O. S. No. 122 of 1913, and dismiss it. It is said that the suit of the defendant is still pending. In the circumstances, we think each party should bear his own costs throughout.

C. A. S.

PRIVY COUNCIL.

PRESENT:—THE LORD CHANCELLOR (LORD BUCKMASTER), LORD WRENBURY AND MR. AMEER ALI.

[On Appeal from the Court of Judicial Commissioner at Oudh.]

Pandit Suraj Narain and another ... *Appellants**

v.

Pandit Ratan Lal and another ... *Respondents.*

(and two connected appeals).

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Pandit Suraj Narain v Pandit Ratan Lal.

Hindu Law—Mitakshara—Joint family—Blending of self-acquired property with ancestral property—Effect of entries in account books as showing whether funds are joint or separate.

A, a member of a Hindu joint family, whose home was at Lucknow, practised as a pleader at Hardoi, and made considerable savings from his professional earnings. He eventually became managing member, but was all along entrusted with the management of the joint family property in Hardoi district. Throughout he kept the accounts of the joint property and of his own earnings in one account book. He purchased sundry properties out of the funds so entered in the name of his son-in-law B, and stated that he made such purchases to provide for B.

Held, that by blending his private earnings with the receipts and payments on joint account he showed an intention to make them joint property: but that this was not conclusive that all purchases entered in the book were made for the joint family: and that as regards the purchases in the name of B, A's statement that they were made to provide for B was a statement against his own interest and as such admissible in evidence, and that coupled with the other evidence in the case it established B's title to such properties as against the joint family.

Consolidated appeals from a judgment and decrees of the Court of the Judicial Commissioner of Oudh (Piggott and Evans, JJ. CC.) dated the 30th October 1909 modifying sundry decrees made by the Additional Judge at Hardoi, dated the 27th August 1908. The parties belonged to a family of Kashmiri Brahmins whose history is set out in *Suraj Narain* v. *Ikbal Narain* [1]. Bishan Narain formed a joint family with his sons, Raj Narain, Ram Narain, Bakht Narain, and Suraj Narain. On his father's death in 1867 Raj Narain became the manager of the

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* 16, 17, 20, 21, 23 and 24th November, 1916 and 30th January, 1917.

1. (1913) I. L. R. 35 A. 227; 24 M. L. J. 345; L. R. 40 I. A. 40.

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family. Ram Narain qualified as a pleader and started practice in 1869 at Hardoi away from the family home, which was in Lucknow. Raj Narain died in 1890, and Ram Narain then became manager, but continued his practice as before at Hardoi. From 1869 till his death in 1900 Ram Narain kept account books in which he entered all his receipts and expenditure. The account books of the joint family continued to be written as before at Lucknow. Ram Narain's daughter was married to Ratan Lal, respondent, who lived with his father-in-law for some time, and afterwards left him to reside in a native state where he was employed. Ratan Lal sent sums of money to his father-in-law from time to time, and Ram Narain purchased considerable properties in the name of Ratan Lal. On Ram Narain's death it was claimed on behalf of the joint family that all properties so purchased by Ram Narain stood *ismfarzi* in Ratan Lal's name and formed part of the joint family property. The Additional Judge held that most of the properties in dispute were purchased with Ram Narain's money, and that the family undoubtedly possessing a nucleus of ancestral property, the properties so purchased by Ram Narain really belonged to the joint family. The Appellate Court held that the transactions impugned as *ismfarzi* were not of that nature, and that in any case the properties were purchased by Ram Narain with his self-acquired income over which he had full powers of disposal, and that having regard to the circumstances of the case and the statement (quoted in their Lordships' judgment) of Ram Narain himself the purchasing of property in the name of Ratan Lal was by way of gift to him and to his wife. Piggott, J. C., (in whose judgment, Evans, J. C., concurred) summed up as follows:—

"For the reasons given, I am of opinion that the fair conclusion upon the evidence is that the money invested by Pandit Ram Narain in favour of Ratan Lal and Madan Mohan Lal, in so far as it was not an investment of money remitted to Ram Narain by Ratan Lal for that purpose, consisted of Pandit Ram Narain's own self-acquired property over which he had full rights of control and disposal. His intention in making these investments would appear to have been expressly to prevent this money from blending with the joint property of the family, and to make provision out of it for the benefit of his only daughter, as well as to give expression to the affection felt by him for his son-in-law

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Ratan Lal. This I may note is substantially the view taken by the District Judge of Hardoi in a rent suit to which Pandit Bakht Narain and Pandit Ratan Lal were parties which came before him for disposal, and I think he put the case very fairly in the said judgment which is on the record as Exhibit F-81. Before leaving this part of the case, however, I wish to add a few words upon another point. I am by no means satisfied that, even apart from my finding that the gifts in favour of Ratan Lal and Madan Mohan Lal were made by Pandit Ram Narain out of his self-acquired property, the plaintiffs would in this case be entitled to succeed, at any rate as regards the bulk of the property in dispute, once the main issue regarding the *ismfarzi* nature of the transactions was decided against them. The position of Pandit Ram Narain must be considered first as it stood before he became manager of the joint family on the death of his brother Pandit Raj Narain in August 1890, and secondly as it stood after that date. Up to the year 1890 we have Pandit Ram Narain living, exercising his profession as a pleader, and carrying on business as a banker and dealer in cloth at Hardoi, while his brother Pandit Raj Narain, the manager of the joint family, resided, practised and carried on business at Lucknow. With the consent of the manager of the joint family, Pandit Ram Narain was allowed the control of a portion of the joint family property, consisting of shares in villages acquired by purchase or on usufructuary mortgage, or taken on farm from Government in the District of Hardoi. The oral evidence of some of the Ziladars and other estate servants produced by Pandit Ikbal Narain as witnesses in this case shows that the income of some of the Hardoi villages was ordinarily remitted direct to Pandit Raj Narain at Lucknow; but no doubt in the main the control of the income arising out of the immoveable property owned by the family in the Hardoi District was in the hands of Pandit Ram Narain. We do not know with any certainty how accounts were settled up between Ram Narain and Raj Narain, and how they stood to one another with reference to their respective enjoyment of the income of the joint family property which came into their hands; but it is fairly presumable that Pandit Ram Narain was allowed by his elder brother to spend a certain portion of the joint family income according to his own will and pleasure, as representing an allowance made to him for his personal enjoyment out of the joint family funds. Now if it be conceded, though I am not prepared to do so except for the sake of argument, that the

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investments made by Pandit Ram Narain in favour of Ratan Lal and Madan Mohan Lal were partly drawn, or even wholly, from that portion of the joint family income thus left to his control and disposal, what would now be the position of the plaintiffs with reference to these investments? Suppose Pandit Ram Narain had simply squandered the money in riotous living; suppose he had made large gifts of cash or jewellery in favour of some woman of bad character on whom he was besotted; or suppose he had made large gifts in favour of some religious teacher, or of some political cause to which he had become violently attached, would the plaintiffs now be entitled to call in question these transactions, or to pursue in the hands of the donees property which could be proved to have been acquired by means of these donations? I conceive not. We know that Pandit Raj Narain himself as manager of the joint family never called in question any of these transactions. If he had felt dissatisfied with Pandit Ram Narain's management of the joint family property he would have been entitled to take the same under his own control, and to limit Ram Narain strictly to the enjoyment of such earnings as might admittedly represent his own self-acquisitions, together with such specific allowance from the joint family funds as he in his capacity of manager might see fit to make. He might, if very seriously dissatisfied with his younger brother's conduct, have brought a suit for partition, or have taken such stringent measures towards excluding Ram Narain from the enjoyment of the joint family property as would have driven the latter to sue for partition on his own account. In such suit for partition, there might also have been a settlement of account, and issues might have been raised as to whether the money squandered by Pandit Ram Narain, or used by him for purposes to which joint family funds should not have been applied, might not be assigned to Pandit Ram Narain's own share, as having been drawn by him in advance from the *corpus* of the family property, very much doubt, however, whether any suit would have been maintainable against the donees for the recovery of money given to them by Pandit Ram Narain, not out of the *corpus* of the joint family property or by alienation of immovable property belonging to the joint family, but out of the income enjoyed by him with the consent of the manager. In any case we know as a matter of fact Pandit Raj Narain made no attempt in his life-time to

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interfere with any of the dispositions in favour of Ratan Lal or Madan Mohan Lal which it is now sought to call in question. From the month of August 1890 onwards to the time of his death, Pandit Ram Narain occupied the position of manager of the joint family. In this capacity his control over the joint family funds would extend so far as to permit him to make gifts of affection to a reasonable and proper extent out of the income of the joint family property. I may refer on this point to "*Bachoo Harkisondas* v. *Mankorebai*" [1]. The rights of the other members of a joint family to control wasteful or improper expenditure of the income on the part of the manager rest principally upon their right at any moment to claim a partition, accompanied by a proper settlement of accounts. The question how far they would be entitled to use for the revocation of gifts made out of the income by the manager of the joint family seems to me at least a doubtful one, and might depend upon the particular circumstances of each case. In the present case at any rate we know that no objection was taken by any other member of the family in Pandit Ram Narain's life-time to any dispositions made by the latter in favour of his son-in-law or his daughter's son. It is only after Pandit Ram Narain's death that the plaintiffs come into Court with the plea that, even supposing the property now in possession and enjoyment of the defendants Ratan Lal and Madan Mohan Lal was received by them by means of gifts made by Ram Narain, such gifts should be held to be invalid and the defendants liable to restore or account for the same. From every point of view this part of the plaintiffs' case in my opinion fails."

Hence these appeals.

A. M. Dunne for Appellants :—There were two questions for determination, (1) Whether there is sufficient evidence to show that Ram Narain so blended his self-acquired property as to make it joint; (2) If the purchases were made with the joint funds—the result of the blending—was the claim of the respondent maintainable? As to the first, it has been concurrently found that the family was joint and undivided, and that for some years Ram Narain was its manager. The whole property possessed by the members of the family ought to be presumed to be joint and the burden of showing that it was not joint lay on the respondent. *Luxmon Row* v. *Mullar* [2].

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1. (1904) I. L. R. 29 B. 51. 2. 2 Knapp, 60.

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The purchases in Ratan Lal's name were *benami.* In such cases the test is the source from which purchase-money was paid. *Dhurm Das* v. *Mt. Sham Soondari* [1]. There is no presumption of advancement in India. On the contrary the presumption is in favour of its being a *benami* purchase unless the contrary is shown. *Gopee Krist Goshain* v. *Gungapersad* [2] and *Pran Kishen Paul* v. *Mothooramohun* [3]. There was nothing to shew that Ram Narain made any distinction between his professional earnings and the income from the family estate. The accounts kept by him indicate that both incomes were blended together and the statement of Ram Narain shewed that all was joint. The present case falls within the principle laid down in *Lal Bahadur* v. *Kanhaia Lal* [4].

As to the second point the respondent has failed to prove that any gift was made to him nor was a gift of such valuable property by the manager of a joint family to his daughter warranted by the Hindu Law.

L. De Gruyther, K. C. and *B. Dube,* for Ratan Lal submitted that Ram Narain did not blend his professional income with the joint family funds. The real test is, Did Ram Narain throw his own, self-acquired income into the common stock? There was no evidence that he did so. The system of accounts that he adopted only shewed that he made entries of all his receipts and expenses in one book. But he kept other account books also which have not been produced by the plaintiffs and which would have shown that he kept the funds of the joint family separate from his own. In the case of *Lal Bahadur* v. *Kanhaia Lal* [4], there was one common stock, and the members of the family were father and son. Ram Narain became manager after 1890. Ram Narain had absolute power to dispose of his professional income, and that he did by purchasing properties in Ratan Lal's name for the benefit of his daughter. The purchase was not *benami* or *ismfarzi*—It was made with the deliberate object of providing for his daughter and her children. His statement made in 1899 and his conduct showed that gift was intended and made. There was no reason for the transaction to be *benami.*

In *Gopee Krist Goshain's* [2] case the family was joint and the purchase was made by the father in his son's name. But

1 (1843) 3 M. I. A. 229, 240. 2. (1854) 6. M. I. A. 53.
3. (1870) 13 M. I. A. 403. 4. (1907) L. R. 34 I. A. 65.

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here all the circumstances point to the fact that Ram Narain intended that the beneficial interest in the properties purchased with his funds should belong to the respondent and his wife. Reliance was placed on the following authorities:—*Obhoy Churn Mookerjee* v. *Panchanan Bose* [1], *Rajah Chundernath* v. *Ramjoy* [2], *Nawab Azimut Ali* v. *Hurdwaree Mull* [3], *Uman Parshad* v. *Gaadhart Singh* [4].

The Courts below were right in respect of the properties to which S. 517, C. P. C. 1882 applied.

Dunne in reply:—The case in Marshall's Reports was distinguishable. It was under the Dayabhaga Law under which the money belonged to the father, but here the money was joint property.

The statement (quoted in their Lordships' judgment) made by Ram Narain in 1899 was inadmissible in evidence. S. 32 (3), Evidence Act did not apply as it was not against the interest of Ram Narain. He was interested in supporting a gift of a portion of the joint family property which he had illegally made. It was a statement made in his own favour rather than against himself. Some properties were purchased in Ratan Lal's name at auction sales, and both Courts have held that S. 517, C. P. C. 1882 precludes the plaintiffs from claiming them. As to that reference was made to:—*Bodh Singh* v. *Ganesh Chunder* [5], *Sankunni Nayar* v. *Narayanan* [6].

Their Lordships' judgment was delivered by

Lord Buckmaster, L. C.

The Lord Chancellor (*Lord Buckmaster*):—In April 1867 Bakhshi Bishnu Narain died, leaving four sons, whose names in order of birth are: Raj Narain, Ram Narain, Bakht Narain, and Suraj Narain. The family was a Hindu joint family, governed by the Mitakshara law and possessing ancestral property. Accordingly, upon his father's death the eldest son, Raj Narain, became Karta, and so continued until his death in August 1890. His brother, Ram Narain, then succeeded and acted as Karta until his death in October 1900. Disputes then arose between Bakht Narain and Suraj Narain as to Bakht Narain's claim to be registered as Karta and as to their rights and the rights of their

1. (1864) Marshall's Reports 564.
2. (1870) 15 Suth. W. R. (P. C.) 7.
3. (1870) 13 M. I. A. 395.
4. (1887) L. R. 14 I. A. 127.
5. (1873) 12 B. L. R. 317, 329.
6. (1893) I. L. R. 17 M. 282.

respective sons in the joint family properties. Some arrangement and reconciliation of this family quarrel, though one neither firm nor durable, seems to have been effected, but disputes broke out again with regard to the property, and four suits were instituted on the 3rd November 1903, by Bakht Narain, and a fifth suit in 1905 by Suraj Narain who claimed a half share in the entire joint estate. These appeals are consolidated appeals in those suits, the question for determination being whether certain very numerous properties acquired since the death of Bakhshi Bishnu Narain are joint property. The appellants, who are certain members of the joint family, contend that they are. The respondent, who is the son-in-law of Ram Narain, says that they are not. The Subordinate Judge decided in favour of the present appellants. The Court of the Judicial Commissioner of Oudh reversed that decision. Hence these appeals.

Raj Narain had no son. Ram Narain also had no son, but had one daughter, to whom her father was much attached. She married Ratan Lal, the respondent, who contends that the disputed properties were either bought with his money or were given him by Ram Narain, and for those reasons are his own, or, at any rate, are not joint property.

The material facts that led up to this dispute are these:—

From about the year 1864 to the year 1880, or, perhaps later, Raj Narain practised as a pleader at Lucknow. In the year 1869 Ram Narain, who was then 23 years old, left Lucknow for Hardoi and from that year onwards practised as a pleader at Hardoi. He was successful, and later in life became a rich man. Before 1890, while Raj Narain was Karta, and after 1890, when Ram Narain was Karta, properties were acquired at Hardoi. They were taken in various names—that of Raj Narain, that of Ram Narain, that of Ratan Lal, those of Ratan Lal and of his son Madan Mohan Lal, and of other persons. The books of account of the family property were kept at Lucknow, where Raj Narain lived; but Ram Narain, who was at Hardoi, acted as manager of the properties at Hardoi as well before as after 1890. He bought properties at Hardoi, receiving, at any rate, in one instance which is proved (that of the village Mahora), money from Lucknow to make the purchase, and he received income and made disbursements in respect of joint family property at Hardoi. But the purchases at Hardoi were made to a large extent not with

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joint family monies, but with fees earned by Ram Narain in his practice as a pleader, and it is with these properties that these appeals are concerned. Under these circumstances their Lordships have taken as the first question to be answered in order to adjust the rights between the parties this question.

Whether there is sufficient evidence to show that Ram Narain so blended his own property with the joint property as to make the whole joint property.

In the Hindu joint family the law is that, while it is possible that a member of the joint family should make separate acquisition, and keep monies and property so acquired as his separate property, yet the question whether he has done so is to be judged from all the circumstances of the case. The latest authority is *Lal Bahadur* v. *Kanhaia Lal* [1]. The facts there were that in 1866 a partition of ancestral property had been effected between three brothers. The question arose in the case of one of the brothers who had thus taken his third share of the ancestral property. He had children. From the year 1852 onwards he had earned money as an official of the Indian Education Department, which he had paid into the same banking account as monies admittedly joint. The question was whether these earnings were joint property. This Board held that they were. The dominant sentence in the judgment is as follows:—

"It is admitted that Durga Parshad and his sons lived together as a "joint Hindu family, and it is established that there was a considerable "nucleus of ancestral property in his hands after the partition. The *onus* was, "therefore, on the respondent to prove that his subsequently acquired property "was his separate estate."

Their Lordships call attention to the fact that the person here spoken of as having ancestral property "in his hands" was the Karta. Down to 1890 Ram Narain was not the Karta. After that date he was. The decision, therefore, applies in strictness to the present cases only from that date. Further, in that case the father was the Karta and not, as in the present case, a brother. But in the facts to be presently stated their Lordships find that the decision has a very close application to the present case.

The position with regard to the private earnings of Ram Narain is this: It has not been established that any circumstances existed from which it could be inferred that there was any joint family estate in the separate earnings of the four brothers, and

1. (1907) L. R. 34 I. A 65.

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it must be accepted that the earnings of Ram Narain were monies which he was at perfect liberty to use in any manner that he thought fit. At the same time, it would be quite consistent with the principle which regulates joint family estates that he should in fact have brought them into the joint property and made them part of the whole. The question is: Has he done so?

There is really little or no direct evidence upon the point except the books of account that he kept, supplemented by his own verbal evidence in a suit that was decided in 1893. But this evidence is important, and, in their Lordships' view, throws considerable light upon the true history of the case. The book of account that he kept, apart from the books of a cloth business carried on at Hardoi and admittedly joint property, and separate registers and accounts of each of the villages, was a book which appears to have been in the same form and continued from 1869 down to the date of his death. It is not strictly an account book at all, but a book in which is recorded from day to day various payments and receipts of money from different sources, and undoubtedly it includes—and, so far as their Lordships are aware, it is the only book that includes—the receipts of his earnings as pleader and his private payments. For the year 1876 the book has been placed *in extenso* in the record. This year has been selected as a typical year, and their Lordships have accepted it as characteristic of the accounts throughout the whole material period of time. In addition to receipts from his professional income, it shows receipts from several properties which are admittedly joint properties, and, although the books and materials were open for the respondents' inspection, and these books included the register of the villages, admittedly owned by the joint family in the Hardoi district, it has been impossible to show that these entries do not include receipts from all the joint properties that were then under Ram Narain's management. The entries also undoubtedly show certain payments of joint accounts, and in the case of the Mahora village they show the receipt of money from the joint family estate and its application in the purchase of this property. There are entries of revenue payments in respect of villages which were joint property; of income received from such villages; of fees received for professional work as pleader; of payments for the purchase of villages, *e. g.*, the village of Samrehta, which was acquired in the name of Raj

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Narain the Karta in July 1876; the villages of Kasmundi and Backharwa, acquired in the name of Raj Narain in the same month; the village of Masit, acquired in December 1876 in the name of Ram Narain; of payments made to servants at Lucknow on account of their pay, and so on. The account may be called an "omnibus" account, into which Ram Narain's professional fees are carried in common with other items such as described, and from these mingled sources a balance is struk day by day, and the whole account is abstracted and summarised at the end of the year. The receipts amount to Rs. 27,206—13—8, of which Rs. 2,866—4—9 are fees, Rs. 12 are presents, Rs. 1,578—3—6 are income from "personal villages on account of village Mahora" and from "joint villages"; Rs. 2,819—6—3 are "from the account of the personal and the leased villages," and so on. On the other side are "purchases, Rs. 16,056—14—0," among which the villages of Masit, Samrehta, and Kasmundi are found. As the result, a credit balance of Rs. 189—1—6 at the beginning of the year becomes a credit balance of Rs. 141—11—1 at the end of the year.

Now there is nothing whatever to show that out of this account payments were from time to time transmitted to the joint family accounts that were kept at Lucknow, and this, in their Lordships' opinion, is a most material matter because, if no such remittances were made, it follows that the balances that were carried forward from time to time and brought into account against future purchases were blended balances of Ram Narain's own earnings and of joint monies and that they remain so blended throughout the whole period of time. It is quite true that, as time went on, other monies were also entered in these accounts which cannot be regarded as joint. There were monies received from Kishan Lal and Ratan Lal, from his daughter, and, it may even be, from other sources, and it is urged that these monies cannot possibly be regarded as blended with the joint family estate, and that therefore Ram Narain's private earnings ought equally to be regarded as outside the joint property. But this argument is not conclusive, because these monies, regarded as the monies of Kishan Lal, Ratan Lal and his wife, were not the monies of people sharing in the joint estate, and were incapable of being blended in the manner suggested and they would remain monies for which Ram Narain would be liable to account; but his own means stood in a different position, and if their association

with the joint family monies in the account in the manner mentioned would be sufficient evidence of their being blended, the mere fact that other monies were there also would not necessarily destroy the value of the inference.

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The respondents had the means of showing before the Subordinate Judge that this system of account could be and was explained, *e.g.*, that this was but an omnibus book, and that he kept a separate joint property account. The respondents did not do so. The Subordinate Judge had all the books before him. Their Lordships have not. He concluded that the appellants were right. Their Lordships are not prepared to differ from him as to the effect of the books, all of which he saw and some of which their Lordships have seen. They have looked carefully to see what the Judicial Commissioners held on appeal as regards this part of the case. They express themselves as "perplexed" by the entries and found it "impossible to arrive at any certain conclusion as to the system on which these various account books were kept up." Their Lordships are not prepared to stop at the point of perplexity. They think that the books blend Ram Narain's professional earnings with his receipts and payments on account of joint properties, and thus afford evidence upon the question under consideration.

A second and most important head of evidence is found in a deposition made by Ram Narain on the 5th August, 1893. This was three years after he became Karta. He says :—

"The money was of our family, partly on account of savings from my "practice and partly from remittances from Lucknow. The sale-deeds are in "names of Raj Narain and some in my name too. I did not send any money in "cash to Raj Narain from Hardoi. He never asked me to send."

And in cross-examination :—

"Money was not sent from Hardoi, as property was being purchased there. "The proceeds of sale of ancestral villages, and other ancestral money were used "in villages in this district and also in other work of the family. No profit was "[*sic*] ever took place in our family. My father had four sons, *viz*., Raj Narain, "eldest, myself, Bakht Narain, and Suraj Narain. We were all joint and all "family property was joint. Partition never took place. One member of the "family works as manager. Raj Narain was manager and now I am manager. "I, Bakht Narain, and Suraj Narain are still joint."

Their Lordships cannot find that the Judicial Commissioners gave any effect to this evidence. It is plain and directly to the point, and they have found no answer to it.

This conclusion, however, does not determine the case. Some of the properties that are in dispute are properties that

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were purchased in the name of the respondent, Ratan Lal, and it is still open to him to show that each of those transactions represented a gift from Ram Narain to himself. This question also is singularly destitute of direct evidence. There is an undoubted foundation from which such an intention could be readily assumed. Ram Narain was on terms of very close and intimate affection with his daughter. She was his sole child, and the formal phrase Nurchasmi, under which he constantly referred to her, conveyed more than a formal meaning. Ratan Lal, his son-in-law, also shared his affection, and seems to have made considerable sacrifices in return. He allowed his wife to stay in her father's house, and in the disputes which divided the family he took the side of Ram Narain against his own parents, and it is said, was therefore disinherited. Ram Narain undoubtedly received from his son-in-law monies for profitable investment, and the suggestion that these monies might be regarded as returned by the payment of certain household expenses is one repugnant to the best ideas and traditions of a Hindu family, and one which their Lordships wholly reject. It is therefore easy to infer that Ram Narain had many motives which would prompt him to make abundant provision for his daughter and her husband, neither of whom would in the absence of such provision have any share in his estate.

But even with this presumption, the mere fact of purchases of properties in the name of Ratan Lal would not of itself be sufficient to show that they were intended as a gift, but their Lordships think that evidence is not wanting to make the inference complete, and that evidence is contained in the statement of Ram Narain himself. Their Lordships are in entire agreement with the Subordinate Judge and the learned Judicial Commissioners in holding that the statement of Ram Narain made in 1899 is properly admitted in evidence. It was a statement which, whether the property was joint or whether it was his own, it was against his own personal interest to make, since in effect it declared that the properties there referred to were those of Ratan Lal; nor do their Lordships see any reason why it should be discredited; and if accepted it furnishes sufficient evidence, taken in connection with the circumstances, to support the claim of Ratan Lal. It is in these terms :—

"The capital outlay required to pay the arrears of revenue was provided "partly by me and partly by Ratan Lal The profits will be enjoyed

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"entirely by him. I manage this estate for him and also his other *zamindari* in "this District. I have bought a lot of *zamindaris* in his name, in order to make "provision for him, as against my adopted son, who would be my heir."

Their Lordships do not think that this evidence and that given in 1893 are irreconcilable. The former related to a period different from the latter, and it does not follow that they cover the same transactions. Upon the view which their Lordships have already expressed, Ram Narain did blend his own monies with the joint family monies, and purchased property in his own name and that of Raj Narain which must be regarded as joint estate; but this does not necessarily lead to the conclusion that the properties purchased in the name of Ratan Lal were of the same character. It is admitted that there were abundant monies coming from the private earnings of Ram Narain to furnish the consideration for these purchases, and that he was at full liberty to use them for that purpose if he so desired. But if once the intention to buy them for Ratan Lal be accepted, as their Lordships think it must, there only remains the question as to whether these monies had been so dealt with by Ram Narain before his purchase as to put it outside his power to gratify the intention of making the gift. The material before their Lordships does not lead them to this conclusion. Remembering that Ram Narain had full power to deal with his earnings as he thought fit, the fact that he blended those that were not otherwise used does not mean that every entry of a purchase in the book is an entry of a transaction so dealt with that it must be regarded as joint property. If, for example, having monies of Ratan Lal's in his own hands, he either by using his own monies or by borrowing on his own account obtained the funds necessary for the purchase of the property in question, and such properties were bought with the intention of benefiting Ratan Lal, the mere fact that the transactions were recorded in the books which also recorded the receipts of his own and the joint monies would not prevent them being used for that purpose, and this view appears to have been taken by the Subordinate Judge; but if this be so it appears to their Lordships to apply equally to purchases made with Ram Narain's monies alone, when once it is accepted that they were used with the intention of making a gift. The learned Judicial Commissioners appear to think that even assuming that they had been blended in the first instance, there was nothing to prevent Ram Narain from making this use of them, and there would appear to be some

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support for this view in the fact that similar joint monies were apparently used for the endowment of the daughter of Ikbal Narain.

Their Lordships do not, however, think it is necessary to rely on this circumstance. For reasons already given, they think that the gift in favour of Ratan Lal may be regarded as established so far, but so far only, as the properties are concerned in the Hardoi district, which were bought in the name of Ratan Lal alone.

There only remains one further point for consideration, and that affects certain properties, Nos. 1—4 inclusive and No. 32 in list 5, which were purchased at auction at a sale under order of the Court in the name of Ratan Lal. Their Lordships were satisfied that any claim to these properties by the appellants is defeated by S. 517 of the Civil Procedure Code.

Their Lordships will therefore humbly advise His Majesty (1) that these appeals ought to be allowed in part; (2) that the decrees of the Court of the Judicial Commissioner of Oudh respectively, dated the 30th day of October, 1909, and the decrees of the Court of the Additional Judge of Hardoi respectively, dated the 27th day of August, 1908, as regards the following properties which have not been in question upon these appeals ought to be affirmed: List V annexed to plaint in Suit 1 of 1908, Item 23, Mauza Gobardhanpur, 2 biswas; List VI-A annexed to plaint in Suit 1 of 1908, Item 1, houses and shops in Hardoi Khas; List VIII annexed to plaint in Suit 1 of 1908, Item 42, decree in suit of Pandit Ratan Lal v. Sripal Singh, and the business carried on in the cloth shop at Hardoi; (3) that it ought to be declared that the appellants are also entitled to the following properties: List V annexed to plaint in Suit 1 of 1908, Item 30, Kashmiri Bagh Sitlaji, Item 31, half share of the land at Pakra; List VI-A annexed to plaint in Suit 1 of 1908, Item 19, land at Suklapur, Item 20, land at Thok Khala, Item 21, land at Thok Uncha; List VIII, annexed to plaint in Suit 1 of 1908, Item 34, decree against Pandit Ram Narain, Item 35, agreement for costs; (4) that the appellant's claim to the remaining properties ought to be dismissed; (5) that in other respects, except as to costs, the decrees of the Court of the Judicial Commissioner ought to be set aside; (6) that subject to the aforesaid declarations and

modifications the decrees of the Court of the Additional Judge ought to be restored; and (7) that the parties ought to bear their own costs of these appeals.

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Solicitors for Appellants :—*James Gray & Son.*

Solicitors for Respondents :—*T. L. Wilson & Co.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE SRINIVASA AIYANGAR.

Chunduru Chinna Lakshmi Narayana and others. *Appellants* * (*Defendants 1 to 6*)

v.

Neralla Venkata Subba Row Minor, by next friend Mamidi Pichamma. *Respondent* (*Plaintiff and Defendants 7 and 8.*)

Chunduru Chinna Lakshmi Narayana v. Neralla Venkata Subba Row.

Will—Administration—A debtor of the testator appointed as executor—Suit by legatee against the representatives of the executor—Nature of the action—Period of limitation for suit—Amendment of plaint—Right to claim interest against representatives of executor.

A died in 1903 having made a will by which he appointed three persons B, C and D as executors of whom B was indebted to him on dealings at the date of his death, and by the same will he gave his widow E authority to adopt a son and bequeathed ⅔ of his residuary estate to the son to be adopted and ⅓ to his widow, the bequests to be paid on the adopted son attaining majority. D having declined to act as executor, only B and C acted as executors. The widow E adopted F in pursuance of the authority given in the will.

In a suit in 1911 by F, still a minor, to recover from the legal representatives of B—B having died in the meanwhile in 1906—as on a debt.

Held, that plaintiff being only a legatee, he does not represent the estate and has no direct claim against any debtor to the estate His only right is to recover as legatee his share of the residue which was bequeathed to him from the executors and if the executors had died possessed of property belonging to the testator to recover the same from their representatives.

If the executors fail to do their duty and refuse or neglect to sue, a legatee may sue the executors in due course of administration and may join the debtor or his representatives as parties and claim payment of the debt due to the estate.

If the debtor himself is one of the executors, the debt payble by him is assumed to have been paid by him to himself and becomes part of the assets of the deceased testator in his hands.

This will be the case whether the executor proved the will or not, provided he acted as executor.

Wankford v. *Wankford* 1; *In re Applebee* : *Leveson* v. *Beales* 2, followed.

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* A. S. No. 194 of 1915. 31st January, 1917.

1. (1703) 1 Salk 329.
2. (1891) L. R. 3 Ch. 422.

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If a person appointed as an executor renounces the office or died without having acted, or obtaining probate, he will be in the position of a stranger debtor and an action to recover the debt will be barred unless brought within the time limited for an action to recover a debt. *Ingle* v. *Richards* [1], followed.

One executor is as much entitled to be in possession of the assets of the testator and expend it in due course of administration as his co-executor, and there can ordinarily be no suit against him by the co-executor to pay over the assets to him. *Beall* v. *Hilliary* [2], followed.

The suit in the present case is not barred as it falls under Art. 123 and especially as the plaintiff is a minor even at the date of the suit. The widow herself will not be barred as the legacy is only payable on the plaintiff attaining majority.

The principles regarding amendments of plaint considered.

The proper order in such a suit will be to direct the defendants to pay into Court out of the joint family property in their hands the sum for which on taking accounts they are found liable and directing its investment when paid under the direction of the Court, liberty being reserved to apply for their shares on plaintiff attaining majority.

As the moneys in the hands of executors have been invested and lent out at interest, their Lordships allowed interest at 6 per cent. from the date of the death of the testator till the date of payment, in the absence of proof that the amounts could have been lent out at any particular rate.

Appeal against the decree of the Court of the Additional Temporary Subordinate Judge of Guntur in O. S. No. 30 of 1913.

T. R. Ramachandra Aiyar and *T. Ramachandra Row* for Appellants.

V. Ramesam and *P. Narayanamurthi* for the Respondent.

The Court delivered the following

Judgment:—Several questions were raised at the hearing of the appeal, but at the close of the arguments there finally emerged for decision two substantial questions:—

1. Whether the suit was barred by the Statute of Limitations; and

2. Whether the suit as brought was maintainable.

The appellants challenged the findings of fact of the Lower Court but as we agree with those findings, it is scarcely necessary to deal with the evidence in detail. The facts which are either admitted or proved may be shortly stated. One Mangayya and Chunduru Subbarayudu, the father of defendants 1 and 2 and grand-father of defendants 3 to 6, had dealings with each other which resulted in mutual accounts. There were three accounts, one for cash dealings, another for purchase and sale of goods on

1. (1860) 28 Beav. 863. 2. 54 Am. Dec. 649.

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each other's account, and a third called the Rice Mills Factory account. The last account requires some explanation. Subbarayadu and others were working some rice mills in Bezwada in partnership, and Mangayya was a sub-partner with Subbarayadu in that concern. Monies advanced by Mangayya to Subbarayadu for the working of the rice mills were entered in the third account. In December 1900, a sum of over Rs. 10,000 was owing to Mangayya from Subbarayadu on No. 1 account, and it appears that he was pressing Subbarayadu for payment of the sums due to him, but Subbarayadu instead of paying him appears to have asked Mangayya for money for the working expenses of the rice mills and proposed that Rs. 5,000 out of the amount which was owing to Mangayya on No. 1 account should be transferred and debited to the rice mills account; the result of such transfer would be that the sum of Rs. 5,000 instead of being a personal debt of Subbarayadu would become an item of account in the partnership between the two. Mangayya agreed to this and the necessary adjustments were made on January 11, 1901; but a year later, either because Mangayya was not bound to contribute any such sum of Rs. 5,000 for the working expenses of the rice mills or for other reasons, the debit of Rs. 5,000 to the rice mills account was cancelled, and that sum was carried to a separate account to the debt of the 1st defendant, Lakshminarayana. That was in January 25, 1902. On the same day the credits and debits in No. 2 account were taken over to No. 1 account and thereafter No. 2 account ceased to exist. That these adjustments were made with the consent of Subbarayadu is established by the evidence. Though the sum of Rs. 5,000 was debited in the name of Lakshmi Narayana, it was a debt owing by Subbarayadu and the joint family consisting of himself and his sons. Lakshmi Narayana does not say that it was a personal debt of his own. He had nothing to do with this adjustment and in fact he disclaims all knowledge of it. Mangayya died on November 24, 1903 and before his death, on November 6, 1903 made his will by which he appointed Subbarayadu, his debtor, Krishnayya his son-in-law, and another Sambayya executors. He gave authority to his widow Sitamma to adopt and bequeathed ⅔ of the residue of his property to the boy to be adopted and the remaining ⅓ to Sitamma. The legacies were payable, on the boy to be adopted attaining the age of majority. Sambayya, one of

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the executors declined to act and Subbarayadu and Krishnayya entered on their duties, though probate was not taken out (no probate was necessary as the Hindu Wills Act does not apply)—and Subbarayadu took a leading part in the administration of the estate. It appears however that the widow Sitamma was in actual custody of the monies belonging to Mangayya's estate, though Subbarayadu was in the direction of affairs, Krishnayya the other executor was receiving salary from the estate and was looked upon as practically a servant. Sitamma was pressing Subbarayadu to repay the sum of Rs. 5,000 and interest but Subbarayadu declined to pay on the ground that the money was in his hands and he as executor was entitled to keep it. He also claimed to retain what may be found due to him on taking the accounts of the rice factory. There was practically no balance due either way on any account. Sitamma finding that Subbarayadu was not paying the debt due to her husband's estate in spite of repeated demands applied for a succession certificate jointly with Krishnayya to collect this debt and certain small debts due to her husband's estate from others and in spite of opposition from Subbarayadu she and Krishnayya obtained a succession certificate on the 19th October, 1905. The plaintiff was adopted by Sitamma on the 5th June, 1905 and Subbarayadu died in June 1906. The present suit was instituted on August 21, 1911 by the adopted son who is still an infant against the defendants, the sons and grandsons of Subbarayadu to recover the said sum of Rs. 5,000 and interest. Neither Sitamma nor Krishnayya the surviving executor is a party to the suit though both of them are named as the next friends of the minor plaintiff.

In this state of things, the first question for determination is as to the nature of the right of the plaintiff in the estate of Mangayya and against the defendants, for on that would depend the article of the Limitation Act applicable to the suit. The estate of Mangayya on his death vested in his executors Krishnayya and Subbarayadu under S. 4 of the Probate and Administration Act. As the plaintiff does not repudiate the will and claim the estate as the surviving member of a joint Hindu family,—according to the decisions of this Court he could not have done so—he is not entitled to sue a debtor of the estate for the debt and the only persons who could sue are the executors. If, however, the executors fail to do their duty and refuse or neglect to sue, a legatee may sue the executors

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for his legacy in due course of administration and may join the debtor or his representatives as parties and claim payment of the debt to the estate. (See *Consett* v. *Bell* [1] and *Morley* v. *White* [2]); but whatever be the form of action the same article of Limitation would apply, and if the cause of action had accrued and time commenced to run during the life-time of the testator, it would continue to run except in the case specially provided for by S. 9 of the Limitation Act. (See *Lala Soni Ram* v. *Kanhaya Lal* [3]). If therefore Subbarayadu had been a stranger-debtor, the claim to recover the debt would certainly be barred by limitation, as the debt became due in January 1902 during the life-time of Mangayya, and the period of limitation for a suit to recover the debt is 3 years. The acknowledgments of liability referred to by the Lower Court even if they satisfy the conditions of S. 19 of the Act, would be of no use as there is none within three years of the date of the suit. If, however, the debtor himself is one of the executors, in whom the estate vests, in legal theory, the debt payable by him is assumed to have been paid by him to himself and becomes part of the assets of the deceased testator in his hands. *In re Bourne*: *Davey* v. *Bourne* [4]; S. 87, Indian Trusts Act. This seems to be the case whether the executor proved the will or not provided he acted as executor, (*Wankford* v. *Wankford*, [5] and *In re Applebee*: *Leveson* v. *Beale* [6]). If however a person appointed an executor renounces the office or dies without having acted or obtaining probate, he will be in the position of a stranger-debtor, and an action to recover the debt will be barred unless brought within the time limited for an action to recover a debt (*Ingle* v. *Richards* [7]). As one executor is as much entitled to be in possession of the assets of the testator and expend it in due course of administration as his co-executor, there can ordinarily be no suit against him by the co-executor to pay over the assets to him (*Beall* v. *Hilliary* [8]); but on the death of one of two executors, the powers of the office are vested in the survivor, and he then may have a right to claim the assets from the representatives of the deceased executor. Also a creditor or a general legatee may for the purpose of recovering his debt or his legacy bring a suit for

1. (1842) 1 Young and Colleyer 569 at 579.
2. (1873) 8 Ch. Ap. 731.
3. (1913) L. R. 40 I. A. 74 : 25 M. L. J. 131.
4. (1906) 1 Ch. 697.
5. (1703) 1 Salk 299.
6. (1891) 3 Ch. 429.
7. (1860) 28 Beav. 366, 368.
8. 54 Am. Dec. 649.

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administration and in that suit claim an account from the representatives of the deceased executor and payment of whatever is found due. Now that Subbarayadu himself was an executor, the co-executor Krishnayya could not bring an action at law to recover the debt due from Subbarayadu but can, if at all, only sue for administration to secure the payment of the debt due to the estate. In such an action, it may not be necessary to join as parties persons beneficially interested in the estate; but the decree in such a suit would not be for payment of the debt as a debt, but would be for an account of the monies belonging to the testator's estate in the hands of an executor, see *Peake* v. *Ledger* [1]; for form of decree the same case reported in 4 De. G. and Smale 137, Seton, p. 1458. But Krishnayya was not bound to bring such a suit so long at any rate as Subbarayadu was alive and the plaintiff cannot be prejudiced by any inaction on the part of Krishnayya (See *In re Pardeo Mc Laughten* v. *Penny* [2].)

The plaintiff in this case is only a legatee and does not represent the estate and has no direct claim against any debtor to the estate. His only right under the will is to recover as legatee his share of the residue which was bequeathed to him from the executors and if the executors had died possessed of property belonging to the testator, to recover the same from their representatives; for there can scarcely be any doubt that the defendants as representatives of their father Subbarayadu would be bound to pay to the estate of Mangayya any assets which remained in the hands of Subbarayadu. As the debt due to Mangayya by Subbarayadu became assets in his hands on his appointment as executor, the plaintiff is entitled to two-thirds of the money which remained in the hands of Subbarayadu at the time of his death and the defendants are liable to pay that sum to the plaintiff. It is not said that any debts or other legacies remain to be paid and any further administration of the estate except dividing the residue between the plaintiff and Sitamma is not necessary. The plaintiff's right then is to recover a legacy, and even if he were an adult his suit would not be barred as he has under Art. 123, twelve years from the time when he becomes entitled to receive it; *Rajamannar* v. *Venkatakrishnayya* [3]; *In re Johnson: Sly* v. *Blake* [4] and *In re Jane Davis*; *In re T. H. Davis* : *Evans* v. *Moore* [5]. But

1 (1850) 8 Hare 313.
2. L. R. (1906) 1 Ch. 265.
3. (1902) I. L. R. 25 M. 361=12 M. L. J. 168.
4. (1885) 29 Ch. D. 964.
5. (1891) 3 Ch. 119.

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whatever Article of limitation applies, as the cause of action accrued to the plaintiff for the first time after the death of Mangayya, and as he is still an infant, his right of action could not be barred.

The next question is whether the plaint is so framed as to give the plaintiff the relief he is entitled to. The claim made in the plaint as it now stands is undoubtedly a legal claim to recover a debt due to the estate as if the plaintiff is the present owner and representative of the estate, and the lower Court has given a decree to the plaintiff for the whole amount sued for on that basis. That as has already been stated is not his right. There can scarcely be any doubt that the plaintiff and his advisers have managed to go wrong as often as they can, and although the plaint was allowed to be amended in the lower Court it is obviously still defective. At the close of the arguments in the appeal, the plaintiff applied for permission to further amend the plaint in accordance with his actual rights in the estate of his adoptive father and subsequently filed a petition for that purpose. This application is opposed by the appellants and the question is whether we should allow it now. The plaint contains all the necessary allegations to give the plaintiff the relief to which he is entitled though there is no specific prayer for administration either general or limited, and the claim is not made as for the recovery of a legacy. It is to make the plaint regular by claiming proper reliefs and to cure the defect as regards parties that the application to amend the plaint has been made in this Court. Inasmuch as the plaintiff is still an infant and as his claim is certainly not barred, to avoid further litigation and expense, we think we should allow the amendment now asked for if we can do so without prejudice to any vested rights of the defendants. Inasmuch as the rest of the properties belonging to Mangayya's estate except the sum due from Chunduru Subbarayadu is said to be now in the possession of Sitamma as guardian of the minor plaintiff and inasmuch as both Sitamma and Krishnayya agree to account to the minor for his share of the residue of the testator's estate and to be bound by all the proceedings which had hitherto been taken in this suit, there is no need to pass a decree for general administration or to send the case back for taking general accounts. In the view we have taken, namely, that the claim of the plaintiff is not a legal claim to recover a debt, but only a right to recover his share of

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the residue, Subbarayadu and his representatives would be entitled to claim, if they so desired, an enquiry as to whether Subbarayadu during his life-time made any payments or was entitled to retain any sum as executor out of the funds which were in his hands. No suggestion was made in the course of the trial in the lower Court that any disbursements were made or expenses incurred by Subbarayadu as executor of the estate of Mangayya, but it was said that if the account of the rice factory partnership is adjusted it will be found that Mangayya's estate was indebted to Subbarayadu. If the defendants insist on an enquiry they are entitled to it. As we can direct this inquiry in this suit, the amendment should we think be allowed and to obviate any possible objection as to want of parties, we also order Krishnayya the surviving executor and Sitamma the other residuary legatee to be added as defendants, reserving however the right of the plaintiff to an account of and payment of his share of the residue in their hands.

As the plaintiff is only entitled to 2/3 of the amount, the decree of the lower Court directing the payment of the whole sum to the plaintiff cannot stand. Further the residue is not payable till the infant plaintiff attains the age of majority. As the legacy is payable according to the terms of the will, on the plaintiff attaining majority it is clear that Sitamma's claim to her legacy is also not barred. In these circumstances it is unnecessary to drive Sitamma to a separate suit to recover her share of the legacy. The proper order then to make in view of the rights of the parties is an order directing defendants 1 to 6 to pay into Court out of the joint family property in their hands the sum for which on taking accounts they are found liable and directing its investment when paid under the directions of the Court. From out of the invested funds the plaintiff should be paid his share, namely 2/3, and Sitamma the remaining 1/3, when plaintiff attains the age of majority; liberty to be reserved to apply for this purpose.

There is one other question in the case, *viz.*, as the debt due to Mangayya from Chunduru Subbarayadu became assets in the hands of Subbarayadu on the death of Mangayya, whether he was bound to pay interest thereon according to the rates stipulated in the contract between the parties or whether after that date he was to be treated as executor with the money of his testator in his hands for which he has not accounted and whether he was chargeable with any interest. It is clear that the monies

if Mangayya which were in the hands of executors could have been invested and lent out for interest, and as it is not proved that they could have been lent out at any particular rate, we think 6% interest from the date of the death of the testator on the sum due till date of payment should be charged. There will be no costs in this Court. The costs of the lower Court will be provided for in the final decree to be passed on taking accounts. There will be a preliminary decree for accounts and inquiries in this Court.

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C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE AYLING AND MR. JUSTICE NAPIER.

Nathamuni Mudali and others ... *Appellants** *(Defendants 2 to 6).*

v.

Parthasaradhi Mudali and others ... *Respondents (Plaintiffs and Defendants 1 & 7 to 12.)*

Nathamuni Mudali v. Parthasaradhi Mudali.

Hindu Law—Illegitimate son—Right to share in family property—Nature and extent of right—Property allotted to legitimate sons at a partition with the father, if liable to the claim of the illegitimate son.

An illegitimate son of a Sudra by a permanently kept concubine can, under the text in the Mitakshara, take a share equal to that of a legitimate son, at his father's choice, and after his father's death can demand of the legitimate sons a share equal to half of that of a legitimate son. This provision for the illegitimate son is really a sort of capitalised maintenance. Therefore, where a father and his sons are in possession of family property and there are no other co-parceners of the same degree with the father, then, as to that joint family property, the right to a full share or possibly less can be given by the father to his illegitimate son. Where however, the father and his sons have separated, there is no longer the material on which the claim of the illegitimate son can operate and the son's share of the property after partition, cannot be made liable to this claim.

Ram Saran Gerain v. *Tekchand Gerain* [1], relied on; *Krishnayyan* v. *Muthusámi* [2], *Jogendro* v. *Nityanand* [3], *Karuppa Govnden* v. *Kumarasámi Gounden* [4] and *Visvanathasámi* v. *Kamu Ammal* [5], referred to.

Second appeal against the decree of the District Court of Chingleput in A. S. No. 45 of 1912, preferred against the decree of the Court of the District Munsif of Poonamallee in O. S. No. 247 of 1911.

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* S. A. No. 695 of 1913. 16th February, 1917.

1. (1900) I. L. R. 28 C. 194.
2. (1883) I. L. R. 7 M. 407.
3. (1890) I. L. R. 18 C. 151.
4. (1901) I. L. R. 25 M. 429.
5. (1912) 24 M. L. J. 271.

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T. V. Muthukrishna Aiyar and *A. Sivarama Menon* for Appellants.

V. S. Govindachariar, V. S. Kallapiran Aiyangar and *T. M. Vedantachariar* for Respondents.

The Court delivered the following

Napier, J.

Judgments:—*Napier, J.*:—This is an appeal from a decision of the District Judge of Chingleput on appeal from the decision of the District Munsif of Poonamallee in a suit brought by an illegitimate son against the legitimate sons of his father, making the father also a defendant, claiming a share of the family property on partition. The lower Appellate Court has given him a decree on the footing that the father tacitly consented to his having a share and that therefore he is entitled to a half share with his legitimate brothers. The legitimate sons appealed to this Court relying on the fact, which has not been disputed before us, that a prior suit had been instituted by one of the legitimate sons to which the present claimant was not made a party and in which the plaintiff sought for partition against his father, that in that suit the father pleaded that he had other legitimate sons of whom the present plaintiff was one, and that therefore they were necessary parties to the suit. It appears that that suit was compromised and partition made, in which the claimant was given no share.

Mr. Muthukrishna Aiyar on their behalf now contends that whatever are the rights of an illegitimate son against his father and whatever they are against his father's legitimate sons after his father's death, once there has been a partition there remained no right to him to claim a share against the sons. We have been taken through a long series of authorities beginning with *Krishnayyan* v. *Muthusami* [1], which have decided the true position of illegitimate son of a *sudra* by a permanently kept concubine under Hindu Law. The broad result of these cases is that an illegitimate son, can under the text in the Mitakshara take a share equal to that of a legitimate son at his father's choice, and after his father's death can demand of the legitimate sons a share equal to half of that of a legitimate son. This power of the father and right of the illegitimate son is treated by the eminent Judges who have considered these cases as being an exception to the strict rule of Hindu Law under which no person other than a co-parcener is entitled to a share.

1. (1888) I. L. R. 7 M. 407.

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It is explained in some of the cases as being really only a sort of capitalised maintenance and that this is the true view of it whether the share is given by the father at his choice or whether under the later text it is claimed against the legitimate sons after the father's death. We do not think it necessary to discuss the principle behind this right. It is sufficient for us that it is definitely and clearly laid down in the Mitakshara and has been fully recognised by eminent Judges like the late Mr. Justice Muthusami Aiyar. We take it, therefore, that where a father and his sons are in possession of family property and there are no other co-parceners of the same degree with the father then, as to that joint family property, the right to a full share or possibly less can be given by the father. And it seems to us to follow from this that where the father and his sons have separated there is no longer the material on which this claim can operate and that therefore the son's share of the property after partition cannot be made liable to this claim. For this latter proposition there is direct authority of the High Court of Calcutta in a case reported in *Ram Saran Gerain* v. *Tekchand Gerain* [1] and we can only say that judging the matter in the light of what we regard as the true inferences to be drawn from the decisions of this Court, we entirely agree with the view taken by the High Court of Calcutta.

For the respondents three points have been taken. First of all, it has been urged that the written statement of the father in the previous suit amounts to a choice within the meaning of the text in the Mitakshara. We have allowed this statement to be filed in this Court and marked as Exhibit B—and have examined it carefully. It is in fact an allegation that the sons are *legitimate* and that they are therefore necessary parties to the suit, and does not purport to make any choice, because the conditions for a choice were not before the father; secondly, it could not operate as a choice because the father had no right to raise any question in that suit other than the question whether there were other persons entitled to be made parties. That suit as we have pointed out, ended in a compromise in which the illegitimate sons were ignored. We cannot therefore treat anything in the written statement in that suit as indicating a choice by the father. The next point taken is that the language of the text of the Mitakshara must be read as meaning that wherever the father wishes that his sons, whether

1. (1900) I.L.R. 28 C. 194.

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legitimate or illegitimate, should be given a share they shall be entitled to that share. Bearing in mind that this right to a share is admittedly an exception to the principles of Hindu Law, we do not feel at liberty to do anything more than construe this text strictly and we have the authority of Judges of this Court for saying that that is the proper manner in which to approach the text. We must therefore confine it to the exact conditions which are stated in the text itself, and, in that view, it is impossible to say that a consent of the father given in circumstances where the choice does not arise and where he has no power to dissent can come within the language of the text. The last point taken is that an illegitimate son has a right under the Hindu Law to a share, which right arises to him at birth, and that the father's choice is only limited to this, namely, that the father can say whether he shall take a whole share or something less. It is conceded by the respondent that this view has never even been considered as possible by any of the Benches of this court that have had this matter under careful scrutiny since the time of *Krishnayyan* v. *Muthusami* [1]. The sole basis for this argument is the decision of the Privy Council in the case reported in *Jogendro* v. *Nityanand* [2] in which the Privy Council held that where the property was in the hands of a legitimate and an illegitimate son and the legitimate son died, the illegitimate son could take the legitimate son's share by survivorship, the estate being impartible. This decision has been considered in two cases, *Karuppa Gounden* v. *Kumarasami Gounden* [3] and *Visvanathaswami* v. *Kamu Ammal* [4] and it cannot be denied that this Court has found some difficulty in ascertaining the principle on which that decision was founded. It must of course be loyally followed wherever that position has to be dealt with. But this Court has steadily refused to extend its application beyond that position or to deduce from it propositions which are at variance with the decisions of this Court. We are asked to say that that decision can only be founded on the proposition that an illegitimate son takes his share at birth. Not only do their Lordships not say that, but they definitely negative that proposition the language being "it cannot be said that at his birth he acquired any right to share in the estate in the same way as a legitimate

1. (1888) I. L. R. 7 M. 407.
2. (1890) I. L. R. 18 C. 151.
3. (1901) I. L. R. 25 M. 429.
4. (1912) 24 M. L. J. 271.

son would do" so that, whatever be the principle which their Lordships apply for the purpose of their decision in that case, it was not the principle of the illegitimate son being a co-parcener at birth.

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It follows, therefore, that so far from assisting the respondent in his argument, this dictum is a direct authority against him. The respondent wished to invite our attention to the text of Mitakshara and found some arguments on the position in which this text is found. Both my learned brother and myself feel that we are not at liberty to reopen this question. It has, as I have said, been exhaustively considered by eminent Hindu Judges of this Court for 40 years and we do not feel in the slightest degree entitled and I may say speaking for myself, competent to review their decisions. We must, therefore, accept the law as laid down in those cases and, as it necessarily follows from those decisions and from the view which we take following the case in *Ram Saran Gerain* v. *Tekchand Gerain* [1], that the claim must fail, this appeal will be allowed, and the decree of the District Judge will be reversed and that of the District Munsif restored, with costs throughout.

The memorandum of objections is dismissed with costs.

Ayling, J.:—I agree.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE SRINIVASA AIYANGAR.

Subbaratna Mudali and others ... *Appellants* * (*Defendants*).

v.

Balakrishnaswami Naidu ... *Respondent* (*Plaintiff*).

Subbaratna Mudali v Balakrishnaswami Naidu.

Hindu law—Dancing girl caste—Succession—Usage—Preference of females to males.

Members of the dancing girl caste are Hindus Male, members of this caste are usually governed by the Hindu law and usage. Also when female members marry and have children, as they sometimes do, their family relations are governed by the Hindu law and presumably the ordinary Hindu law of inheritance will govern succession to their properties At the same time, their female children may remain unmarried and become professional *dasis* without any degradation or stigma attaching to them so long as they observe the caste

* S. A. No. 1291 of 1916. 3rd April, 1917.

1. (1900) I. L. R. 28 C. 194.

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customs. There is no dissolution of the natural tie of relationship between the members of the caste who remain unmarried and follow their trade and their married relations who lead a respectable life.

Usage has however sprung in their caste which permits affiliation of daughters and gives preference to females in matters of succession. The ordinary Hindu Law of inheritance which excludes females or prefers males to females, and which allows only a limited interest to female heirs, has no application to the dancing girl caste. *Held*, accordingly, in a case of disputed succession to the property of a dancing girl, that the mother's mother's father's brother's daughter was a preferable heir to the mother's mother's father's brother's daughter's son.

Authorities on the point discussed.

Second appeal against the decree of the District Court of Trichinopoly in A. S. No. 256 of 1914 preferred against the decree of the Court of the District Munsif of Karur in O. S. No. 82 of 1913.

K. S. Ganesa Aiyar for Appellants.

T. S. Ramaswami Aiyar for Respondent.

The Court delivered the following

Judgment:—This appeal raises an interesting question as to the succession to the property of a woman of the dancing girl caste. The deceased woman Palani inherited the property in dispute from her mother Nagu, who inherited it from her mother Mottai who again inherited it from her father Arunachallam. Arunachallam had two brothers Ramaswami and Mathurbutham and the question is whether Mathurbutham's daughter Seethai or Ramaswami's daughter's son Marudamuthu Mudali is the heir of Palani. All the women appear to have followed the profession of a prostitute. That members of this caste are Hindus is certain, though the ancient writers and their modern exponents find some difficulty in fixing them in one of the four castes; but whether they belong to the Sudra or fourth caste or to a separate fifth caste is immaterial. That male members of this caste are usually governed by the Hindu Law and usage does not seem to have been questioned; so also when female members marry and have children, as they sometimes do, their family relation is governed by the Hindu Law and presumably the ordinary Hindu Law of Inheritance will govern succession to their properties. At the same time their female children may remain unmarried and become professional *dasis* without any degradation or stigma attaching to them so long as they observe the caste customs. It is well-known that at least in the Southern Districts they are supposed to be married to the idol of some temple and it

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is a question not beyond dispute whether after such a marriage, signified by the tying of a *bottu* and *thali* by the archaka or priest, they can contract a real marriage with a member of their caste. They are not virgins, are not married women and never become widows. We are led to make these observations for showing that there is no such thing as a dissolution of the natural tie of relationship between the members of the caste who remain unmarried, and follow their trade and their married relations who lead a espectable life. Even in the case of the married or unmarried women of other castes who have become degraded by their immoral conduct, it is now settled that the natural relationship is not broken between such common women and their respectable relations and the ordinary rule of the Hindu Law of Inheritance applies. But it will be seen at once that that law which is based on a system of legal marriage and consequential relationship, cannot be applied at all or at least without very considerable modifications to the property of a woman of this caste who except her own children can ordinarily have relations only through females. The rules as to stridhan obviously do not apply to such property and there is no other rule of succession laid down in the Smrithis or by the commentators prescribing the devolution of the property of women of this caste, except it be the general rule "that to the nearest Sapinda the inheritance next belongs". According to Vignaneswara 'Sapinda' connotes merely relationship (See Acharadhyaya Vivahaprakaranam, pp. 31, 32 & 35, *Setlur's Edition. Trans*: 1 Madras Law Journal 75. Usage has therefore sprung up in this caste which permits affiliation of daughters and gives preference to females in matters of succession.

This was recognised in one of the early cases in this Court *Kamakshi* v. *Nagaratnam* [1]. There the two daughters of a son inherited the mirasi office of their grand-mother. On the death of one of them her daughter was held entitled to her share of the office jointly with the aunt. The learned Judges held that the rules of inheritance applicable to paternal property were applicable to succession to the property of the mother, treating the females as if they were males, as that was necessary from the nature of the case. It is to be observed that the females so inheriting the property take an absolute interest therein as a male. Apparently the learned Judges thought they were applying the ordinary

1. (1870) 5 M. H. C. R. 161.

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Hindu Law of Inheritance, with such modifications as they thought necessary to suit the circumstances of the case; but we can find no authority in that law for such a manipulation. We think the correct basis was usage. In *Venku* v. *Mahalinga* [1], Muthusami Aiyar, J., after a review of the previous decisions concluded that the Civil rights of the members of this class are to be adjudicated upon in the absence of a positive rule to the contrary with reference to the custom of the caste and the analogies of the Hindu Law. (See p. 399). Apparently on that analogy it has been held that a dancing woman and her daughters may constitute a joint Hindu family. (*Chalakonda Alasani* v. *Chalakonda Ratnachalam* [2].) In *Muttukannu* v. *Paramasami* [3], the same learned Judge held that by custom plurality of adoptions was recognised in the section of the caste whose practices were in question and that the adopted daughter succeeded in preference to and to the exclusion of the son of another deceased adopted daughter. Evidently the right of representation was not allowed to a daughter's son. In *Narasanna* v. *Gangu* [4], it was held that the sister's adopted daughter was entitled to succeed to a deceased dancing woman's property in preference to her brother. This would be in accordance with the principles governing the devolution of the property of the female members of the caste, but the learned Judges based their decision on degradation being a ground of preference. They followed the decision in *Sivasangu* v. *Minal* [5] which however was not a case of succession to the property of a woman of the dancing girl caste, but of a married woman who became degraded by becoming a prostitute. This ground of preference to succeed to a prostitute's property is no longer law. *Subbaraya Pillai* v. *Ramasami Pillai* [6], *Mandaram Nammaiya Chetty* v. *Mandaram Thiruvengadathan Chetty* [7], *Minakshi* v. *Muniandi Panikkar* [8]: but it is to be observed that these cases leave the law as to dancing girls as it was before.

Acting then on the analogy of the cases decided in respect of the devolution of the property of dancing girls, we think Seethai was a preferential heir to her cousin's son. She is nearer in realtionship to the deceased and the ordinary Hindu Law which

1. (1888) I. L. R. 11 M. 393 at p. 399.
2. (1864) 2 M. H. C. R. 56
3. (188.) I. L. R. 12 M. 214.
4. (1889) I. L. R. 13 M. 133.
5. (1889) I. L. R. 12 M. 277.
6. (1899) I. L. R. 23 M. 171.
7. (1912) 13 M. L. T. 88.
8. (1914) 27 M. L. J. 353.

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excludes females or prefers males to females has no application to the case of dancing girls. This is also in accordance with the consciousness of the parties, for it is said in the judgment of the District Munsif that the defendants conceded that there was a special custom as regards inheritance to property left by a dancing girl under which heirs who are also dancing girls take the property of the deceased in preference to male heirs. It is also clear that the ordinary Hindu Law of inheritance is not applicable to these parties, for when the female heirs succeeded they took an absolute estate. The appeal must therefore be dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, *Chief Justice*, MR. JUSTICE OLDFIELD AND MR. JUSTICE KUMARASWAMI SASTRI.

V. Perumal Pillai ... *Appellant* (6th Defendant).*

v.

R. M. M. R. M. Raman Chettiar ... *Respondent (2nd Plaintiff).*

F. B.

Perumal Pillai v. Raman Chettiar.

Transfer of Property Act, S. 60—Mortgagee releasing portion of the mortgaged property, not bound to abate proportionate part of the debt.

A mortgagee voluntarily releasing from the suit a portion of the mortgaged property is not bound to abate a proportionate part of the mortgage-debt.

Krishna Ayyar v. *Muthukumaraswamiya Pillai* [1], *Jugal Kishore Sahu* v. *Kedar Nath* [2], referred to.

Ponnusami Mudaliar v. *Srinivasa Naicken* [3], *Surjiram Marwari* v. *Barhamdeo Persad* [4], dissented from.

Second Appeal against the decree of the Court of the Subordinate Judge of Tuticorin in Appeal Suit No. 71 of 1913, preferred against the decree of the Court of the District Munsif of Tuticorin in Original Suit No. 231 of 1911.

This case came on for hearing in the first instance before Seshagiri Aiyar and Napier, JJ. who made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—The point for decision in this case is whether a mortgagee suing on his mortgage is entitled to exonerate

* S. A. No. 1698 of 1914. 28th April, 1917.

1. (1905) I. L. R. 29 M. 217, 224.
2. (1912) I. L. R. 34 A. 606.
3. (1908) I. L. R. 31 M. 333.
4. (1906) 1 C. L. J. 337.

F. B.

Perumal Pillai v. Raman Chettiar.

Seshagiri Aiyar, J.

certain items of the mortgaged property from liability and can recover the whole debt by the sale of the other items. There are some possible theories: one is that by virtue of the contract of mortgage every item of the property is charged with liability for a proportionate share of the debt; another that the mortgagee has the option to recover the whole debt from any one or more of the properties mortgaged; and a third that the purchaser of the equity of redemption in any portion of the mortgaged properties is entitled to assume that the burden of the debt is distributable equally upon the whole property. The principle of S. 37 of the Transfer of Property Act may be invoked in his favour. The first proposition is not affected by the principle that after decree, it is open to the mortgagee decree-holder to sell any one of the properties covered by the decree to satisfy the decree debt. It may be said that whatever may have been the original obligation of the properties to contribute rateably, the decree imposes a liability jointly and severally (if one may use such an expression in respect of things as opposed to persons) upon the properties comprised in the decree, and that the rights of the decree-holder are not restricted to proceeding rateably against each item of the property. Therefore, the cases which recognise the right after decree to sell any one of the properties do not compel me to hold that it is a necessary corollary from it that the mortgagee has the right to proceed in the suit against any one of the properties mortgaged.

It has been held by Benson and Miller, JJ., in *Ponnusami Mudaliar* v. *Srinivasa Naickan* [1], that if a mortgagee voluntarily releases in the suit a part of the mortgaged property, he cannot throw the whole burden of the debt on the other portion. Dr. Rash Behary Ghose has taken the same view in his book on Mortgages. In *Krishna Ayyar* v. *Muthukumaraswmiya Pillai* [2], Sir Arnold White, C. J., and Subrahmania Iyer, J., held "that, if the action of the mortgagee had had the effect of extinguishing the mortgage lien upon any portion of the mortgaged property so as to relieve it from the liability to bear its proportion of the debt, he cannot recover more than what the property he proceeds against would be rateably liable for." They proceed to observe "so long as the equities in the matter of contribution as between these parties are thus unaffected by the act of the plaintiff, the latter's right to be paid the whole

1. (1908) I. L. R. 31 M. 333. 2. (1905) I. L. R. 29 M. 217.

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of his debt from whatever portion of the mortgaged properties he wishes to comprise in his suit cannot be questioned." *Hari Kissen Bhagat* v. *Veliat Hossain* [1], supports the proposition enunciated in *Ponnusami Mudaliar* v. *Srinivasa Naickan* [2]. In *Moro Raghunath* v. *Balaji Trimbak* [3] (decided before the Transfer of Property Act was extended to Bombay), the same view was taken. The question was discussed at some length in *Jugal Kishore Sahu* v. *Kedar Nath* [4], and the learned Judges held that although as between the mortgagor and the mortgagee, the latter may be entitled to recover his debt by the sale of any one of the items mortgaged, the moment the equity of redemption in them passes to third persons, this right ceases to be exercisable. The third theory, I suggested, may account for this view.

It is contested, on the other hand, that the right to contribution is secured by S. 82 of the Transfer of Property Act; that that right is enforceable by and against the purchasers of the various items of property, without interfering with the rights of the mortgagee to proceed against any one of these items. This is the view taken recently by my learned brother, Mr. Justice Napier, in *Venkata Subba Reddi* v. *Bagiammal* [5]. In this state of the authorities, I think it desirable that the following question should referred for the opinion of the Full Bench.

"Whether a mortgagee voluntarily releasing from the suit a portion of the mortgaged property is bound to abate a proportionate part of the mortgage debt?"

Napier, J.

Napier, J.,:—I do not think that it can be disputed that primarily every portion of the mortgaged property whether there were originally more than one mortgagors or by assignment there has become more than one, is security for the mortgage debt and that the mortgagee has the option of recovering the whole debt from any portion. The only question is whether his right is lost by the fact of his releasing part of the mortgaged property either for a proportionate amount of the debt or freed from any liability and if so whether this benefit operates in favour of an original mortgagor or an assignee only. As my learned brother points out a view has been taken that by such release rights of contribution are lost and *therefore* the mortgagee's right to recover

1. (1903) I. L. R. 30 C. 755.
2. (1908) I. L. R. 31 M. 333.
3. (1888) I. L. R. 13 B. 45.
4. (1912) I. L. R. 34 A. 606.
5. (1915) I. L. R. 39 M. 419=29 M. L. J. 319.

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the whole debt from the remaining property is put an end to. This proposition is however not accepted in *Jugal Kishore Sahu* v. *Kedar Nath* [1], for the Court in that case on page 610 states that "notwithstanding the release, the part released remains liable to contribute rateably". In spite of this view the Court held, as my learned brother points out, that when the equity of redemption has passed to a third party the right to proceed against that part of the mortgaged property for the balance ceases to be exercisable. The case in *Hari Kissen Bhagat* v. *Veliat Hossein* [2], does not rest on any question of contribution either but only decides that where the mortgagee is willing, as in that case he was, to apportion the debt between the released property and the other and so brought his suit for a portion against the other only he could not be compelled to make the released mortgagor a party. (The head note is, I think, misleading). I have given my best consideration to the matter in *Venkata Subba Reddi* v. *Bagiammal* [3] where I point out that it will be a strange result if on the true construction of S. 82 of the Transfer of Propety Act the right of contribution of the properties is lost, whereas by S. 44 of the Contract Act the release "does not free the joint promisor from responsibility to the other joint promisor." My learned brother and myself have lately considered this section in Second Appeal No. 1659 of 1914 and have held that "the contract to the contrary" means a contract between the owners of the equity of redemption and not a contract between the mortgagee and one of the owners. It is to be noted that in *Krishna Ayyar* v. *Muthukumaraswamiya Pillai* [4] the Court does not decide that releasing does release the property from its liability to the co-mortgaged properties. If no arrangement made between one of the mortgagors and the mortgagee can affect the rights of the other mortgagors to make the released property liable for its rateable proportion under S. 82, the basis for the equity is gone, and I am unable to see why any equity is required where a statutory remedy is provided by the section. I agree with my learned brother in the terms of reference.

S. Panchapagesa Sastri for *K. R. Rangaswami Aiyangar*, Vakil for the Appellant.

K. S. Jayarama Aiyar for *T. Arumainatham Pillai*, Vakil for the Respondent.

1. (1912) I. L R. 34 A. 666.
2. (1903) I. L. R 30 C. 755.
3. (1915) I. L. R. 39 M. 419 at 422=29 M. L. J. 319.
4. (1905) I. L. R. 29 M. 217.

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The Court expressed the following

Opinion:—We think this question must be decided with reference to the provisions of the Transfer of Property Act, and more especially of S. 60 which deals with the right to redeem. Redemption in England is an equitable relief which the Court allows on such terms as have been considered equitable in a long course of decisions. One of the established rules is not to allow redemption of any portion of the mortgaged property except on payment of the whole of the mortgage debt, and further limitations of the right to redeem are to be found in the doctrines of Tacking and Consolidation. In India the right is now governed by S. 60 which gives the mortgagor a right to redeem on payment or tender of the mortgage money but expressly provides that "nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor." This section ignores the equitable doctrine of consolidation which requires the mortgagor to pay something more than the mortgage money as a condition of redemption, but it adopts and gives statutory force to the rule that a part of the mortgaged property is not to be redeemed except on payment of the mortgage money. One exception only is made for the case of the mortgagee having himself acquired part of the mortgaged property. To insist on the mortgagor paying the mortgagee the whole mortgage money in such a case without a proportionate abatement would give the mortgagor an immediate right of suit against the mortgagee or his assignees to recover back by way of contribution what he had paid in excess of his proportionate share, and this the legislature has avoided by the exception. It has not made any such statutory exception in favour of the mortgagor in the case, mentioned in the order of reference, of a mortgagee voluntarily releasing from the suit a portion of the mortgaged property, and we are not at liberty to derogate from the terms of the section by introducing one. Nor can we entertain the argument that such a case can be considered to come within the exception because the action of the mortgagee in releasing part of the mortgaged property is an acquisition by himself within the meaning of the section.

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If the mortgagor is not entitled to an abatement from the mortgage money on this ground in a suit for redemption, the same rule must, we think, apply in a suit for sale or foreclosure in which the Court has equally to fix the sum on payment of which the mortgagor is entitled to redeem. In *Krishna Ayyar* v. *Muthukumaraswamiya Pillai*, [1] there is an observation at the close of the judgment "that if the action of the mortgagee (in releasing part of the mortgaged property) has had the effect of extinguishing the mortgage lien upon any portion of the mortgaged property so as to relieve it from the liability to bear its proportion of the debt, he cannot recover more than what the property he proceeds against would be rateably liable for." It is, we think, clear that the release by the mortagee has no such effect, and that the released portion of the mortgaged property remains liable for contribution under S. 82 of the Transfer of Property Act, as pointed out by Chamier and Piggot, JJ., in *Jugal Kishore Sahu* v. *Kedar Nath* [2]. The owner of part of the mortgaged property who pays off the mortgage debt is entitled under this section to contribution from the rest of the mortgaged property, in the absence of a contract to the contrary, that is to say, unless he has deprived himself of that right by contract. We may also observe that the words in the first paragraph of the section "where several properties............are mortgaged to secure one debt" means have been mortgaged, just as in the second paragraph the words "where ....one is mortgaged to secure one debt and then both are mortgaged to secure another debt" the meaning is clearly has or have been mortgaged; and that the language of the section affords no foundation for the argument that the owners of part of the equity of redemption could be deprived of their right to contribution under the section by the action of the mortgagee in releasing another portion of the mortgaged property.

The decision in *Ponnusami Mudaliar* v. *Srinivasa Naickan* [3], proceeds upon the authority of a passage in Mr. Ghose's well-known work on Mortgages and does not consider the provisions of the Transfer of Property Act on which we have based our conclusion. This is also true of the Calcutta decisions to the same effect to which we have been referred, beginning with *Surjiram Marwari* v. *Barhamdeo Persad*, [4]. With great respect we are con-

1. (1905) I. L. R. 29. M. 217 at p. 224.
2. (1912) I. L. R. 34 A. 605.
3. (1908) I. L. R. 31 M. 333.
4. (1905) 1 C. L. J. 337.

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strained for the reasons already given to differ from those decisions, and to hold that having regard to the provisions of the Transfer of Property Act it is not open to us to give effect to the suggested equity against a mortgagee who releases part of the mortgaged property from the mortgage. To do so would no doubt make a subsequent suit for contribution unnecessary, but on the other hand it would introduce additional complications into mortgage suits which are already complicated enough. In our opinion however the question has to be decided not on the balance of convenience, but in accordance with the provisions of the Act, and for the foregoing reasons we answer the question referred to us in the negative.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE SESHAGIRI AIYAR.

A. K. T. K. M. Narayanan Nambudripad ... *Appellant** (*Petitioner*).

v.

Tawker J. Megaji Seit and others ... *Respondents* (*Counter-Petitioners*).

Narayanan Nambudripad v. Megaji Seit.

Civil Procedure Code, S. 63—Execution sale by inferior Court during pendency of attachment by superior Court—Sale valid.

The Court of the District Munsif of C. attached and brought to sale certain property during the pendency of an attachment of the same property by the Court of the Subordinate Judge of C. It was found that the purchaser at the execution sale had notice of the prior attachment by the Court of the Subordinate Judge.

Held, that the sale was valid and that the proceedings of the inferior Court were neither illegal nor without jurisdiction.

Appeal under Cl. 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Srinivasa Aiyangar, dated 11th January 1916, in Civil Revision Petition No. 64 of 1914 praying the High Court to revise the order of the District Court of South Malabar, dated 9th September 1913 in Civil Miscellaneous Appeal No. 17 of 1913 (preferred against the order of the Court of the District Munsif of Manjeri in C. M. P. No. 2293 of 1912).

T. R. Ramachandra Aiyar for Appellant.

K. P. M. Menon for Respondent.

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* L. P. A. No. 78 of 1916. 2nd May, 1917.

Narayanan Nambudripad v. Megaji Seit.

The Court delivered the following

Judgment:—The observations of the learned Judge that the purchaser in this case (3rd respondent) had no notice of the attachment by the Court of the Subordinate Judge appears to have been made inadvertently and is not based on any finding that we can discover in the judgments of either of the lower Courts.

We must call for a finding on this issue,

"Was 3rd respondent at the time of his purchase at Court auction aware of the existence of an attachment of the Court of the Subordinate Judge on the property sold."

The District Judge will take evidence on this point and return a finding in two months. Seven days will be allowed for filing objections.

[In compliance with the order contained in the above judgment, the District Judge of South Malabar submitted a finding in the affirmative on the issue.]

The property in dispute was attached by the Court of the Subordinate Judge of Calicut. While the attachment was subsisting, the District Munsif of Manjeri in execution of a decree of the Court of the Principal District Munsif of Calicut attached the same property and brought it to sale. The respondent was the purchaser. An application was made by the Subordinate Judge's Court decree-holder to set aside the sale. The Courts below upheld the sale. In this Court, Mr. Justice Srinivasa Aiyangar took the same view. Hence the Letters Patent Appeal.

We think that the language of the 2nd clause of S. 63 of the Code of Civil Procedure 1908 leaves no room for doubt that the legislature intended to hold that the sale is valid.

Before the Act of 1908 the decisions were to this effect. It was held in Calcutta (*Gopi Chand Bothra* v. *Kasimunnessa Khatun* [1]) that the sale held in contravention of the provisions of S. 285 of Act XIV of 1882 was not a nullity. *Har Prasad* v. *Jagan Lal* [2] took the opposite view. In *Kunhayan* v. *Ithukutti* [3] and in *Abdul Karim* v. *Thakordas* [4] an intermediate view was taken to the effect that if the purchaser took the property with knowledge that an attachment by a superior Court was subsisting, his sale should be set aside. In this state of the authorities

1. (1907) I. L. R. 34 C. 836.
2. (1904) I. L. R. 27 A. 56.
3. (1898) I. L. R. 22 M. 295.
4. (1898) I. L. R. 22 B. 88.

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the legislature has said "nothing in this section shall invalidate any proceeding taken by a Court executing one of such decrees." In our opinion, this language is intended to give legislative sanction to the view taken in Calcutta. Of course, if any question of fraud arises, the protection would be of no avail. In the absence of fraud, each decree-holder is entitled to proceed with the execution of his decree. The legislature has enacted for the convenience of the various decree-holders that the Court which shall deal with the assets shall be the superior Court. It is clear that the other Court has also jurisdiction to carry into effect proceedings in execution of its own decrees. Consequently, the direction for investing the superior Court with power to distribute the assets seems to be directory and not mandatory. In this view, the proceedings of the inferior Court should not be regarded as illegal and without jurisdiction.

We must therefore hold, that the sale to the respondent was not invalid and that the Courts below were right. We affirm the decision of the learned Judge and dismiss the appeal with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE AYLING AND MR. JUSTICE KUMARASWAMI SASTRI.

Masilamani Mudaliar ... *Appellant** (*2nd Respondent*).

v.

Sethuswami Aiyar and another... (*Respondents* (*Petitioner and 1st Respondent*).

Masilamani Mudaliar v. Sethuswami Aiyar

Limitation Act, S. 20 and Art 182—Oral application, when a step-in-aid of execution—Application for execution by decree-holder containing admission of part payment of decree-amount—Certificate of payment—Effect on limitation—Civil Procedure Code, O. 21, R. 2, scope of.

When the Civil Procedure Code requires a written application for execution, a mere oral application instead, is not a step-in-aid of execution, and where a written application is filed as required by the Code, a mere oral repetition of a request contained in the execution application is not a step-in-aid. In order that an oral application may be effective as a step-in aid of execution the application must be one which it is necessary to make in order to get the main reliefs prayed for in the execution petition. It must be of such a nature that, if the application were not made, further proceedings in execution could not be taken either by reason of the specific prayer not being contained in the execution application or

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* A. A. A. O. No. 30 of 1916. 30th April, 1917.

Masilamani Mudaliar *v.* Sethuswami Aiyar.

by reason of the Civil Procedure Code or the Rules of Practice requiring some further acts to be done before the main reliefs prayed for in the execution application can be granted or enforced.

Per *Ayling, J.*—Nothing is prescribed in O. 21 R. 2 of the Civil Procedure Code as to the time within which or the manner in which the decree-holder must certify payment. A statement by the decree-holder in his application for execution, of the fact of his having received a portion of the decree-amount within 3 years of the application can be accepted as a certificate of payment under O. 21, R. 2 cl (1) of the Civil Procedure Code. Such a payment would, if proved, operate to save limitation under S. 20 of the Limitation Act.

Per *Kumaraswami Sastri, J.*:—An uncertified payment of a portion of the decree-amount, if made before the expiry of the period of limitation, is sufficient to save a decree from the bar of limitation.

Appeal against the order of the Court of Temporary Subordinate Judge of Tanjore in Appeal Suit No. 203 of 1915, preferred against the order of the District Munsif of Tanjore, dated 7th November 1914, in Execution Petition No. 526 of 1914 in Original Suit No. 379 of 1906 on the file of the Court of the District Munsif of Kumbakonam.

K. R. Subramania Sastri for Appellant.

K. Ramachandra Aiyar for Respondents.

The Court delivered the following

Ayling, J.

Judgments:—*Ayling, J.*:—1st respondent in this caseis the assignee decree-holder in Original Suit No. 379 of 1906 on the file of the Court of the District Munsif of Kumbakonam, and the sole question for disposal is whether his Execution Application (E. P. 526 of 1914) presented on 12th August 1914 was barred by Article 182 of the Indian Limitation Act, 1908 (Schedule I). The next previous application of which there is record was Execution Petition No. 385 of 1911, presented on 13th July 1911; but the decree-holder relies on the following circumstances to save limitation:—

(1) An oral application in aid of execution presumed to have been made on the 12th August 1911, in the course of the hearing of Execution Petition No. 385 of 1911.

(2) An alleged payment towards the decree on 17th August 1911.

As regards the first, the facts are simple. In Execution Petition No. 385 of 1911, the decree-holder applied for attachment and sale of the judgment-debtor's moveables after issue of the preliminary notice required by Order XXI, Rule 22 of the Code

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Ayling, J.

of Civil Procedure. Notice was accordingly issued to the judgment-debtor for 12th August 1911. On that date as the judgment-debtor did not appear, attachment order was issued; but, as the decree-holders failed to pay batta within the time allowed, the petition was dismissed on the 26th August 1911. The Subordinate Judge says;—

"It seems to me, looking to the liberal spirit in which acts done by a decree-holder are viewed by the Madras High Court to operate as steps in aid of execution (*vide* 1914, Madras Weekly Notes, page 563) it will not be wrong to hold that the decree-holder should be presumed to have made an oral application for issue of a warrant of attachment on 12th August 1911 and this was a step-in-aid of execution.

Now in my opinion the utmost that can be presumed is that the decree-holder was present in court on 12th August 1911, either in person or by pleader, and intimated his desire to proceed with execution. He had already asked for attachment in his written application; and assuming that he repeated his request by word of mouth in court, I am unable to see any ground for viewing this as a fresh step-in-aid of execution. The point is, not that the application was oral, but that it was the merest repetition, and an entirely superfluous repetition, of an application, which he had already made in writing, and which was pending orders of the court. None of the cases relied on by the 1st respondent's vakil seem to me to be of use to him. In the Calcutta Full Bench Case, *Ambica Pershad Singh* v. *Sardari Lal*, [1] there was an application to issue proclamation nearly a year after the attachment, which indeed the Judgment-debtor claimed to be no longer subsisting; and Judgment of Garth, C. J., makes it quite clear that he held that, without such a fresh application, no further action should have been taken by the court. In *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu*, [2] the batta Memorandum was accompanied by a written application; and the court lays stress on the fact that the proclamation would not have issued if the batta Memorandum had not been put in. *Abdul Kader Rowther* v. *Krishnan Malaval Nair*, [3] is a case in which Sadasiva Aiyar and Spencer, JJ., held that an oral application by a decree-holder for an adjournment to enable him to adduce evidence was a step-in-aid of execution. This is a view, in which speaking with all deference, I find

1. (1884) I. L. R. 10 C. 851. 2. (1905) I. L. R. 28 M. 399
3. (1914) I. L. R. 38 M. 695=26 M. L. J. 433.

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Ayling, J

it impossible to concur; and, if the facts of that case were similar to those of the present case, I should be inclined to make reference to a Full Bench. Fortunately they are not; and with the general principle enunciated I have no quarrel, *i. e.*, if even an oral application is for an order which is really a step-in-aid, it may be treated as within the scope of Article 182 of the Indian Limitation Act. I am inclined to think however that such applications will be rare.

The most recent case, *Varadaraja Mudali* v. *Murugesam Pillai* [1], is cited chiefly for the proposition that Article 182 of the Indian Limitation Act, 1908, should receive a fair, liberal, and not too technical construction so as to enable the decree-holder to obtain the fruits of his decree. I quite agree: but it seems to me that the danger is, not of too technical construction of the article, but that the courts in their anxiety to prevent justice being defeated by technicalities, may introduce so much uncertainty, that it will be most difficult for any party to know whether execution of a decree is barred or not. Where the starting point is the recorded date of presentation of a formal application, we are on sure ground; but if any unrecorded oral intimation of the decree-holder's desire to proceed may be treated as such, the ascertainment of the period will be beset by extraordinary difficulties. I feel confident that nothing of the kind was contemplated by the Legislature and that there is nothing in the Act to support such a construction.

I would therefore hold that the presumed oral application of 12th August 1911 does not save limitation.

It then becomes necessary to consider the second point regarding which the Subordinate Judge decided against the decree-holder on the ground that the payment was not certified to the court, and, therefore, under Order XXI, Rule 2 of the Code of Civil Procedure, could not be taken into account.

The payment is set forth in column 5 of Execution Petition No. 526 of 1914, which was presented within 3 years of the date of the alleged payment. I see no reason why this should not be accepted as a certificate of payment under clause (1) of the rule; for nothing is prescribed in the rule as to time within which or the manner in which the decree-holder must certify payment,

1. (1916) 30 M. L. J. 460.

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Ayling, J.

(*Vide Rajam Aiyar* v. *Ananthharatnam Aiyar* [1], and *Lakhi Narain* v. *Felamani Dasi* [2]). No doubt a court will do well to carefully scrutinize evidence of a payment reported in such circumstances, where the fact of payment is denied; but there is no reason why, if proved, such a payment should not be considered in the light of S. 20 of the Indian Limitation Act.

I would therefore call for a finding on the following issue from the Court of the Subordinate Judge after taking evidence:

"Is the alleged payment of Rs. 25 by the judgment-debtor on 17th August 1911 true?: and does it operate to save limitation under S. 20 of the Indian Limitation Act?"

Two months will be allowed for submitting the finding and seven days for filing objections.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J. :—I agree and have little to add. I do not think that the *mere* oral repetition of a request contained in the execution application is a step in aid of execution. Where, however, several reliefs are prayed for in the execution application, which the court is not bound to grant concurrently, or, where an application to the court is made, asking it to exercise its discretion in matters where it is not bound to grant the prayer asked for in the execution application as a matter of course, the fact, that the relief asked for orally is already contained in the execution application, would not prevent the oral application from being effective as a step-in-aid of execution. Order XXI, Rule XI of the Civil Procedure Code, 1908, after providing for an oral application for execution at the time of the passing of the decree requires a written application containing the particulars specified in the order and specifying the mode in which execution is sought. Rule 176 of the Civil Rules of Practice, 1905, only enables a party to apply orally for orders which are necessary to give effect to or work out the prayers contained in the execution application without the necessity for putting in an application in writing for every small step necessary for realizing the fruits of a decree. When the Code requires a written application for execution, it cannot be contended that a mere oral application would be a step-in-aid of execution, and where a written application is filed as required by the Code, an oral application to the same effect is a mere superfluity.

1. (1915) 29 M. L. J. 669. 2. (1913) 20 C. L. J. 181.

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In order that an oral application may be effective as a step-in-aid of execution the application must be one which it is necessary to make in order to get the main reliefs prayed for in the execution petition. It must be of such a nature that, if the application were not made, further proceedings in execution could not be taken either by reason of the specific prayer not being contained in the execution application, or by reason of the Code or the rules of practice requiring some further acts to be done before the main reliefs prayed for in the execution application can be granted or enforced.

As regards the payments acknowledged in the execution application the decision of this Court in *Rajam Aiyar* v. *Anantharatnam Aiyar* [1] is clear, and I do not think that the payments can be ignored as not certified if they were as a matter of fact made. I agree with the order proposed by my learned brother.

[In compliance with the above order, the Temporary Subordinate Judge of Tanjore submitted a finding in the negative, on the issue remitted.]

The Court delivered the following

Judgment :—We accept the findings and as a result, set aside the order of the Subordinate Judge and direct that the petition be dismissed with costs throughout.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS [FULL BENCH.]

PRESENT :—SIR JOHN WALLIS, *Chief Justice*, MR. JUSTICE OLDFIELD AND MR. JUSTICE KUMARASWAMY SASTRI.

V. Subramania Iyer ... *Appellant* * (*Plaintiff*)

v.

Rathnavelu Chetty and others ... *Respondents (Defendants).*

F B. —— Subramania Iyer v. Rathnavelu Chetty.

Hindu Law—Illegitimate son of permanently kept concubine entitled to status of dasi-putra—Succession to property of—Right of putative father surviving such son, there being neither issue, widow nor mother of son—Hindu Law—Inheritance—Text declaring male is heir of male—Mutuality—Interpretation of text—Rules of.

The putative father of an illegitimate son, born of a permanently kept concubine and entitled under the Hindu law to be the sole heir or one of the heirs to his putative father's properties, inherits, in the event of his surviving his illegitimate son, the properties of the latter there being neither widow nor issue nor mother of the said son.

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* O. C. C. A. No. 1 of 1916. 4th May, 1917.

1. (1915) 29 M. L. J. 669.

F. B.

Subramania Iyer v. Rathnavelu Chetty.

Per Kumaraswami Sastri, J.:—As between the illegitimate son and his putative father filial relationship exists for all purposes of inheritance and succession.

Where a text expressly declares that a male is the heir of male, there is, in the absence of anything to the contrary in other texts, nothing to prevent the converse rule from being applied as a rule of equity and good conscience even though the case is not specially provided in the texts so long as there is nothing against it in the Smritis.

Appeal against the Decree of the Madras City Civil Court in Original Suit No. 356 of 1914.

This appeal came on for hearing in the first instance before Sadasiva Aiyar and Napier, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH :—

Sadasiva Aiyar, J.

Sadasiva Aiyar, J. :—The plaintiff is the appellant. He is the purchaser of the plaint property from the defendants Nos. 3 and 4 and from the deceased father of the defendants Nos. 3 and 4 (by name, Parthasarathi Mudali). Parthasarathy Mudali was the brother of the deceased Krishnasawmy Mudali who died in 1882. Krishnasawmy Mudali had two sons, a legitimate son Jagannadham who survived his father and died in 1886 and an illegitimate son Narayanasawmi who had predeceased him in 1875. The suit was brought for redemption of a mortgage on the plaint house created by the illegitimate son Narayanasawmi in 1873.

Though the plaint contained allegations that Parthasarathi Mudali and Krishnasawmy Mudali were undivided brothers and that Narayanasawmi was (like Jagannatham) a legitimate son of Krishnasawmi Mudali, the learned City Civil Judge found against these contentions and his conclusions were not attacked before us.

There was again an alternative allegation (or rather suggestion) in the 8th paragraph of the plaint that the plaint property belonged to Krishnasawmi alone even during the lifetime of his illegitimate son, Narayanasawmi Mudali, and another suggestion in paragraph 9 of the plaint that it belonged to Krishnasawmi Mudali's illegitimate son, Narayanasawmi Mudali alone. On a liberal construction of the plaint, we might hold that the plaintiff based the title of his vendors (Parthasarathy Mudali and his sons) on these alternative statements of facts also.

Narayanasawmi Mudali, the illegitimate son, mortgaged the plaint house to Sabapathi Chetty, the father of the defendants Nos. 1 and 2, in 1873 and the plaintiff (as I said before) sues to

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redeem the mortgage as the purchaser of the equity of redemption from Parthasarathi Mudali and his sons. The question for decision is whether Parthasarathi Mudali and his sons became the owners of the equity of redemption on the death of Jagannatham (Krishnasawmi's legitimate son) in 1886.

Narayanasawmi Mudali, having mortgaged the property as his own in 1873 during the lifetime of his putative father, Krishnaswami Mudali, and it not being alleged in the plaint that Narayanasawmi acted as the *benamidar* of his said putative father, Krishnasawmi Mudali, in effecting the mortgage, we intimated during the course of the argument (agreeing on this point with the learned City Civil Judge) that the plaintiff ought to trace his title to the equity of redemption on the basis that Narayanasawmi Mudali was the sole owner of the property on the date of the mortgage of 1873.

The appellant's learned Vakil then argued on that basis to the following effect: when Narayanasawmi Mudali died in 1875, his putative father, Krishnasawmi Mudali, became his heir under the Hindu Law. On Krishnasawmi's death in 1882, Krishnasawmi's legitimate son, Jagannatham, inherited the equity of redemption. On Jagannatham's death in 1886, his paternal uncle, Parthasarathi Mudali, (one of the plaintiff's vendors) inherited the equity of redemption.

The contesting respondents (the mortgagee defendants Nos. 1 and 2) contended before us that Krishnasawmi Mudali, the putative father, was not under the Hindu Law the heir of his illegitimate son, Narayanasawmi Mudali. They base the said contention on two lines of reasoning. (1) The mother of Narayanasawmi who lived with Krishnasawmi as his permanent concubine was not an "unmarried woman," within the meaning of the Hindu Law texts bearing on the question of the rights of the illegitimate son, as she was a widow when she came under the keeping of Krishnasawmi Mudali. Therefore Narayanasawmi Mudali could not be the heir to Krishnasawmi Mudali, as not having the status of such an illegitimate son as is recognised as an heir by the Hindu Law. If then Narayanasawmi Mudali had no right to inherit to Krishnasawmi Mudali (in case Narayansawmi Mudali, the son, survived Krishnasawmi Mudali, the father), it followed *a fortiori* that Krishnasawmi, the father, who survived Narayanasawmi, the son, could not inherit to his said illegitimate son. (2) Even if

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Narayanasawmi Mudali could have inherited to Krishnasawmi Mudali, it does not follow that Krishnasawmi Mudali could under Hindu Law reciprocally inherit the property of his illegitimate son, Narayanasawmi Mudali.

The first branch of this argument, namely, that Narayanasawmi Mudali was not such an illegitimate son that he could inherit to Krishnasawmi Mudali if he had survived, found favour with the learned City Civil Judge on the strength of the ruling in *Annayan* v. *Chinnan* [1]. There the learned Judges, notwithstanding that re-marriage of widows is sanctioned by Statute Law, held that, if re-marriage is unlawful by custom, concubinage with such widow is prohibited connection. They also held that "unmarried" does not mean "not married to the putative father" but "not married to anybody before." I respectfully dissent from that decision. Reliance was also placed on *Sundaram* v. *Meenakshi Achi* [2]. But this decision which related to the son of a dancing girl who had not severed her connection with a temple was explained away in the recent Full Bench case reported in *Soundararajan* v. *Arunachalam Chetty*, [3] as having turned on the finding of fact, arrived at in the former case, namely, that that dancing girl was not proved to be a permanently kept concubine as she had not severed her connection with the temple. It was decided in the said Full Bench case that if the connection of the concubine was not of an adulterous or incestuous nature, the illegitimate son by her is entitled to inherit the father's properties. The expression in the texts translated loosely as "unmarried woman" merely means "a woman not married to the father of the person whose rights of inheritance were under consideration." I therefore cannot uphold the learned City Civil Judge's decision on the ground on which he based it. There then remains for decision the next question of Hindu Law "whether when the illegitimate son, if he had survived his putative father, would have inherited to the latter, the putative father could reciprocally inherit his said son's property, if the son left no widow or issue." In *Mayna Bai* v. *Uttaram*, [4] the facts were as follows: A European Christian, Hughes by name, lived in an adulterous connection with a Brahmin married woman and had two illegitimate sons, Taukooram and

1. (1909) I. L. R 33 M. 366=20 M.L.J. 355. 2. (1912) 16 I. C. 787.
3. (1916) I. L. R. 39 M. 136=29 M. L. J. 793. 4. (1861) 8 M. I. A. 400.

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Ramaprasad. Each got 1/5 share in a village under the will of their putative father Hughes. Taukuram died first. The question was whether Ramaprasad could inherit Taukuram's estate. (Ramaprasad instituted the suit which went up to the Privy Council, but he died during the course of the litigation. His widow Mayna Bai as his heir and others were the appellants before the Privy Council). The Tinnevelly Zillah Court submitted the following question to the Pandit of the Sudder Dewanny Court for his opinion: "You are requested to state whether, upon the death of one of two illegitimate sons of a Hindu woman, the estate of the deceased by law devolves upon the surviving brother." The Pandit returned the following answer: "If the illegitimate sons referred to in the question were undivided, the estate of one of them would, after his death, devolve upon the surviving brother. If divided, 'it would go to him' only on failure of the deceased's widow, daughter, or her son, *or of the deceased's mother*." Their Lordships of the Privy Council pointed out at page 423 of the report that as the plaintiff Ramaprasad and the deceased Taukuram were sons of their father by an adulterous connection with a Hindu woman, they could not have inherited to their father. Next they point out "It was not referred to the Law Officers to consider whether the inability of the sons to succeed to the father affected their heritable capacity *as collaterals inter se.*" So their Lordships were not prepared to say whether the opinion of the Pandits was right or wrong as they were not properly instructed on the facts. Then they go on to say "It is, however, impossible to treat these sons as the sons of a Sudra father; if the plaintiff and Taukuram be viewed as the sons of a Sudra mother, still the property never was hers, and their heritable capacity even to property of hers has not been established. If any general usage in this part of India has ripened into a custom having the force of law, that the illegitimate children of a woman pursuing an unchaste course of life, *whether married or unmarried,* inherit her property, this custom is not in proof."

"If amongst Sudras proper, a course of decisions, or other evidence of the prevalency of a general custom, support a heritable capacity of illegitimate Hindus beyond that which the writers' text-books establish, these decisions have not been made known, nor has that custom been established. But a title such as the present, so wholly irreconcilable with the expositions of any text-

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writer, and, unsupported by any authority, cannot be established upon the evidence which this case affords. To assume without evidence, on assertion simply, a capacity in the appellant and his uterine brother to inherit to their mother, and assuming that capacity of lineal inheritance to their mother, thence to derive collateral heirship, *inter se*, to property which never was their mother's, would be at variance with legal principles." Then their Lordships finally say that they have come to the conclusion that "the only safe course to be taken is to remit the question whether with reference to local custom and usage such illegitimate brothers, though born of an adulterous connection, may collaterally inherit to one another," "the question being remitted to India for further investigation and consideration."

When the case came back before the Madras High Court, it was decided by Phillips and Holloway, JJ., in a judgment to be found in *Mayna Bai* v. *Uttaram* [1]. I shall quote a few passages from this judgment. "The authorities seem to show clearly that the Hindu Law, although, for obvious reasons, not recognising as the husband's son one got by a man of unequal class, nevertheless gives no ground whatever for supposing that the circumstance of birth from illicit connection severs the union between the mother and her son, so as not to admit of heritable blood between them. This being so, there seems no ground, either of authority or analogy, for contending that, if Taukuram had died without issue, his mother would not have succeeded to him. This would equally have been the case, if she was a Sudra or of a class still lower, as we think that, in the view of Hindu Law, she was. That the illegitimate offspring of women of the lowest Hindu classes daily succeed to the property, both of their mother and of one another, without question or dispute, *we can, upon our own experience, affirm.* It would be illogical if it were otherwise, for the illegitimate son of a Sudra, in the absence of preferable sons, is his heir. That *the property is almost invariably small of itself prevents any question coming before the Courts. Further, the practice is so well understood that litigation would be hopeless.*" "Our reasoning, therefore, is that there is no authority against the existence of heritable blood between the woman, and her illegitimate offspring. Taukuram and his brother are decided to be Hindus. They are Hindu sons of a woman, of a class lower than

1. (1864) 2 M. H. C. R. 196, *et seq.*

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the fourth of Manu's classes, and in this case the sons *are cognate to her and one another*, as the children of a class not twice-born, out of wedlock, and entitled to inherit to their mother, and only not capable of inheriting to their father." "Of the cognation between her and her offspring there exists no doubt whatever." "All the analogies of Hindu Law are against the view of a bastard taken by the law of England." "Ulpian points to the true distinction, and one which is entirely in conformity with the doctrines of Hindu Law. As agnation and consanguinity are the offspring of a marriage by the *Jus civile*, no spurious son can have them, but he is related to his own mother and to his brother by that mother." Finally the learned Judges felt justified in holding that "all the analogies of Hindu Law and the plain rules of justice and equity are in favour of the evidence of heritable blood between the illegitimate sons of Hughes by this Hindu mother." In *Tara Chand* v. *Reeb Ram* [1] Frere and Holloway, JJ., held that the descendants of Hughes following Hindu manners and customs were governed by the Mitakshara Hindu Law, relying upon *Abraham* v. *Abraham* [2]. In *Krishnayyan* v. *Muttusami* [3], it was held that the illegitimate sons of a Sudra V, though entitled to inherit to their father V, if he had died divided from V's brother S, could not prevent the whole property passing to their father's brother S by survivorship, nor could they inherit collaterally to their said paternal uncle S in preference to S's widows. The learned Judges (Turner, C. J. and Muthuswami Aiyar, J.) say that "the illegitimate son is placed in the Mitakshara on the same footing with a daughter's son, and the conception of co-parcenary presupposes sapinda relationship and a legal marriage." If, according to the Mitakshara (as now settled), sapinda relationship depends only upon having particles of the same body, I am not sure that it necessarily presupposes legal marriage. As that very learned lawyer, J. C. Ghose says (page 184 of his book on the Principles of Hindu Law, II Edition). "The texts of Gautama, Parasara and Devala and the interpretations of the Mitakshara, the Parijata, and the other commentaries, *except the Dayabhaga*, leave no room for doubt that sapinda meant connected through bodily particles" (which connection ceased with the fourth descendant), I might also refer to the

1. (1866) 3 M. H. C. R. 50. 2. (1863) 9 M. I. A. 195.
3. (1884) I.L.R. 7 M. 407.

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Vaidyanatha Dikshitiyam (see Setlur's Collection of Hindu Law Books on Inheritance, pages 549 and 550) as to the meaning of the word "sapinda." Then the learned Judges say "Inasmuch as neither a widow nor a daughter nor a daughter's son can exclude a co-parcener's right of survivorship, it appears to us that neither can an illegitimate son do so". Then they state "Another question is whether as illegitimate sons, the second appellant and his brother were entitled to succeed to their paternal uncle Sundara. Adverting to the several secondary sons known to the ancient Hindu Law, six of them are declared to be heirs to kinsmen in Datta Chandrika, S. V, 22. It follows that illegitimate children, who are inferior to them all and who do not exclude the daughter's son, cannot succeed to collateral heirs." Though the question decided in *Mayna Bai* v. *Uttaram* [1], by Phillips and Holloway, JJ., was in some respects different from the question which arose in *Krishnayyan* v. *Muttusami* [2], the right of collateral succession and the general status of illegitimate sons were considered in the earlier case and I am bound to say that I was rather struck by the fact that no reference at all was made to this earlier decision in the later case *Krishnayyan* v. *Muttusami* [2]. If the case *Krishnayyan* v. *Muttusami* [2] has to be distinguished from that in *Mayna Bai* v. *Uttaram* [1], it can only be on the ground that while two illegitimate sons may have cognate blood *through their common mother* which enables them to inherit collaterally to each other, an illegitimate son has no such connection by blood with his paternal uncle *through his putative father* as to allow collateral succession to his uncle. This case in *Krishnayyan* v. *Muttusami* [2], was followed in *Ranoji* v. *Kandoji* [3], by Turner, C. J. and Muthuswami Aiyar, J., and again in *Parvathi* v. *Thirumalai* [4] by Collins, C. J., and Muthuswami Aiyar, J. In *Parvathi* v. *Thirumalai* [4], the learned Judges seem to disapprove of the case in *Sadu* v. *Baiza and Genu* [5], and *Jogendra Bhupati* v. *Nityanand Man Sing* [6], which applied the analogy of adopted sons to illegitimate sons. In *Siva Sengu* v. *Minal* [7], Muthuswami Aiyar and Parker, JJ., went so far as to say that the legitimate daughter could not succeed to the property of her mother who had become degraded

1. (1864) 2 M. H. C. R. 196.
2. (1884) I. L. R. 7 M. 407
3. (1884) I. L. R. 8 M. 557.
4. (1887) I. L. R. 10 M. 334.
5. (1888) I. L. R. 4 B. 37.
6. (1885) I. L. R. 11 C. 702.
7. (1889) I. L. R. 12 M 277.

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through prostitution on the ground that all heritable blood-connection ceased between the legitimate daughter and the degraded mother on the mother's degradation. This was, however, not followed in *Minakshi* v. *Muniandi Panikkar* [1] (by Oldfield and Seshagiri Aiyar, JJ.) wherein it was held (see page 357) that *Siva Sengu* v. *Minal*[2], was overruled by *Subbaraya Pillai* v. *Ramasami Pillai* [3], decided by Boddam and Subrammania Ayyar, JJ. In *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nittyanand Man Sing* [4], the head note is "Under the Mitakshara, among Sudras, where a father left a son by a wedded wife, and an illegitimate son, the ordinary rule of survivorship incidental to a family co-parcenary was held to apply; and the illegitimate son, having survived the legitimate, was held entitled by survivorship to succeed to the family estate, which was impartible, on the death of his brother without male issue." In that case their Lordships approved of the decision in *Sadu* v. *Baiza and Genu*, [5] which was disapproved by Collins, C. J. and Muthuswami Aiyar, J. in *Parvathi* v. *Thirumalai* [6]. If the legitimate and illegitimate sons could form a Hindu Law co-parcenary, it seems to me difficult to hold that they had no mutual heritable blood. Nanabhai Haridas, J. (whose opinion was relied on by their Lordships of the Privy Council) says at page 46 (*Sadu* v. *Baiza*) [5] " while admitting, therefore, that the position of a *Dasiputra* in a Sudra family does differ in important particulars from that of an Aurasaputra, *I am not prepared to allow that the former is not a member of the family at all*, nor that he is not a co-parcener, and not, therefore, entitled to succeed by right of survivorship. *His legal status as a son is unquestionably recognised*, and accordingly he inherits from his father even before the latter's widow; and if there are *Aurasaputras* of his father, he succeeds to his father's estate jointly with them. He is clearly therefore their co-parcener. *That he is their brother, not only in the popular, but also in the legal acceptation of the term* is evident from the Mitakshara, Chapter 1. S. XII, 1, 2, where they are spoken of both by Yajnavalkya and Vignaneshvara as his " brethren " and " brothers" (*bhratarah*). Whether he can as a brother inherit anything from them or not, is a question upon which we are not called upon to pronounce any opinion in this case, for the plaintiff

1. (1914) 27 M. L. J. 353.
2. (1889) I. L. R. 12 M. 272.
3. (1899) I. L. R. 23 M. 171.
4. (1892) I. L. R. 18 C. 151.
5. (1883) I. L. R. 4 B. 37.
6. (1887) I. L. R. 10 M. 334.

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here does not claim any self-acquired property of Mahadu; nor are we called upon to express any opinion upon the other question, whether he can inherit anything from collaterals." That, in ancient Hindu Law, he came in as one of the twelve classes of sons there can, in my opinion, be no doubt and his being allowed afterwards only to share with the widow, daughter and daughter's sons instead of inheriting his father's estate wholly was a development of the later Smrithis and commentators just as the rule of survivorship itself and the doctrine of unobstructed heritage in the Mitakshara and the doctrine of right by birth were later developments. It seems to me that the authority of the cases in *Krishnayyan* v. *Muttusami* 1, *Ranoji* v. *Kandoji* 2 and *Parvathi* v. *Thirumalai* 3 so far as they treat the illegitimate son as not a coparcener or a sapinda require reconsideration in the light of the Privy Council decision in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nittyanand Man Sing*, 4. In *Ramalinga Muppan* v. *Pavadai Goundan* 5, an instructive decision of Benson and Bhashyam Iyengar, JJ. is reported. Plaintiff and R. were divided brothers in a family of Sudras. R. kept a permanent concubine, by whom he had two illegitimate sons. Both of these sons pre-deceased R, leaving legitimate sons of their own then surviving. R then died. The question was wheter the legitimate sons of the illegitimate sons of R were entitled to inherit R's property in preference to R's divided brother, the plaintiff. Bashyam Iyengar, J. says at page 523 "it is unnecessary to consider whether the decisions of this Court in *Krishnayyan* v. *Muttusami* 1, *Ranoji* v. *Kandoji* 2, and *Parvathi* v. *Thirumalai* 3 above referred to are in any way affected and, if so, to what extent, by this decision of the Privy Council," that is, the decision in *Jogendra Bhupati Hurrochundra Mahapatra* v. *Nittyanand Man Sing* 4. Then in an earlier portion of his judgment at page 521, that very learned Judge says "there is no direct authority either in the Hindu Law texts or in judicial decisions, applicable to the case" before him. (I might say almost the same about the present case). Then at page 524, the learned Judge proceeds to decide by analogy and says 'An illegitimate son's right of inheritance to his father's property, or at least to a part of it, is not contingent but absolute, as in the case of a legitimate son, since, if he has legitimate

1. (1884) I. L. R. 7 M. 407. 2. (1884) I. L. R. 8 M. 557.
3. (1887) I. L. R. 10. M. 334. 4. (1892) I. L. R. 18 C. 151.
5. (1901) I L. R. 25 M. 519 *et. seq*=11 M. L.J. 399.

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half brothers or other heirs of his father down to a daughter's son, he gets a half share and, in the absence of such heir, the whole estate. The Sudra's illegitimate son is therefore in a position *more analogous to that of a legitimate son than to that of other relations whose right of inheritance is liable to obstruction.* The principles, therefore, applicable to the succession of sons and grandsons of legitimate sons may *by analogy* be applied to the sons and grandsons of an illegitimate son, namely, that they should be considered capable of representing the illegitimate son and in case he dies before his father, of taking the share which would have fallen to him if he had not so died." "It may be doubtful whether the illegitimate issue of the illegitimate son can, on the principle of *Jus representationis,* represent the illegitimate son, if before the inheritance opened, the latter predeceased his father. But it is unnecessary to consider that question as the respondent is the legitimate son of his father," In *Ravji Valad Mahadu* v. *Shakuji Valad Kaloji* [1] an illegitimate son was held not entitled to claim collateral succession. The judgment is however too short to be of much value and merely follows the expressions of opinion in certain Madras and Allahabad cases. The denial to an illegitimate son of a right to collateral succession can be justified on the ground that by express texts, he comes under the second class of six sons who are debarred from inheriting to kinsmen collaterally, this being one of the anomalies of the Hindu Law which do not rest upon any principle but only upon texts. I could understand such a view and it may be too late to go behind the established precedents which deny right of collateral succession and which have ignored the decision in *Mayna Bai* v. *Uttaram* [2]. But that an illegitimate son is not connected by blood with his father and mother so as to have sapinda relationship with them is in my opinion (with the greatest deference to opinions contra) unsustainable. In *Soundararajan* v. *Arunachalam Chetty* [3], I considered the status of an illegitimate son and I was of opinion that the illegitimate son of a Sudra born not of an adulterous or incestuous connection must be treated in all respects as a son subject only to his being treated as on a lower status to a legitimate son and to his being compelled to share his inheritance with the widow, daughter and daughter's sons, owing to express texts of Hindu Law. The literal meaning

1. (1909) I. L. R. 34 B. 321. 2. (1864) 2 M. C. H. R. 196.
3. (1914) I. L. R. 39 M. 136=29 M. L. J. 793.

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of "*Aurasa* son" corresponds to the English expression "son born of the loins" and there are expressions in sacred writings (like the expression *Marutasya Aurasaputrah* in the Ramayana) which show that an illegitimate son can be called the *Aurasa* son of the putative father. All analogies as between father and son, or mother and son should in my opinion be applied in his case except that by the course of decisions based upon rather obscure texts he is precluded from claiming rights of collateral succession. Those obscure texts state that an illegitimate son is not a *dayada* (heir) but is only a *bandhu* (that is, they clearly recognise his blood relationship). The glosses to Manu's Slokas 158 and 160, Chapter IX, "except to their fathers" and "to collaterals" are the commentators' and are not in the texts. Again Golap Chandra Sarcar points out (Hindu Law, III Edition, pages 187 and 188) that there are only three Smrithi texts available on the rights of illegitimate sons to direct succession to their fathers, namely, one of Brihaspati, one of Manu and one of Yagnavalkya. As far as I know, *there is no separate text* as to the succession to an illegitimate son of a Sudra and succession *to him* must, in my opinion, be treated as if he was an ordinary Sudra. The respondent's Vakil relied on the case in *Shome Shankar Rajendra Varere* v. *Rajesar Swami Jangam*.[1] That decision could be rested (as it was rested among other grounds) on the text of Manu (as interpreted by commentators) that an illegitimate son is not a collateral heir as he comes under the second set of six sons who are not heirs though they are kinsmen, Chapter 1, Mitakshara. That he is a kinsman, that is, a man connected by blood relationship, is admitted in Sections 30 and 31, Chapter 1, Mitakshara, the very sections which are relied on to show that he is not an heir to collaterals. The distinction between the first six classes of sons and the second set is not that the first set of sons are kinsmen and the second are not kinsmen, but that the first set are both kinsmen and heirs while the second set are only kinsmen, so far as collaterals are concerned. In *Shome Shankar Rajendra Varere* v. *Rajesar Swami Jangam* [1], it is no doubt stated that sapinda relationship presupposes a lawful marriage. I am unable to understand this observation which seems merely to follow the opinion found in a Madras decision already quoted. Sarvadhikari in his "Principles of the Hindu Law of Inheritance", at page 944, so far as inheritance is

1. (1898) I. L. R. 21 A. 99 at pages 103 and 104.

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concerned, thinks that an illegitimate son ought also to succeed to collaterals, but, as I said before, it is probably too late to go back on the long course of decisions which have established the contrary.

The direct question arising in this present case has not been so far as I know covered by any decision, namely, whether the putative Sudra father can inherit to his illegitimate son born of a connection not adulterous and incestuous.

Though I have dealt in detail with the several arguments relied on by the respondent's learned Vakil, I think that the question before us really depends on the construction to be placed on Yagnavalkya's text as to the course of succession in the absence of lineal descendants and that all other considerations are of very doubtful relevancy and tend only to obscure the real point for decision. In Chapter 2, Section 1, Placitum 2, the Mitakshara quotes Yagnavalkya's texts as follows:—"The wife and the daughters also *both parents*, brothers likewise and their sons, gentiles, cognates, pupils and a fellow student: on failure of the first among these, the next in order is the heir to the estate of one who departed to heaven leaving no male issue. *This rule extends to all classes.*" Then in Section 3, the Mitakshara considers why the parents are entitled to succeed and bases the right solely on "*propinquity*" of blood. This general rule, of bringing in the parents after the wife and daughters (in default of the two kinds of sons) must clearly apply to succession to an illegitimate son of a Sudra. The putative father of a Sudra by a permanently kept concubine is a "father" under the Hindu Law, and I am inclined strongly to hold, under the above text of Yagnavalkya quoted (Yagnavalkya 2, 136 and 137), that such putative father is clearly entitled to inherit to his illegitimate son after the mother of that son. The learned City Civil Judge, while admitting that, by analogy based on reciprocity, the putative father will be the heir to the illegitimate son, denied the father's right solely on the ground that the illegitimate son in this case was not the heir to his father because the mother was a widow. His view that the illegitimate son is not an heir being opposed to the Full Bench decision in *Soundararajan* v. *Arunachalam* [1], the reasoning on which his opinion was based against the father's right of inheritance falls to the ground. (I am however, not inclined to rely on the doctrine of

1. (1915) I. L. R. 39 M. 136=29 M. L. J. 793.

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reciprocity which is not a safe guide in Hindu Law and I rely on the text of Yagnavalkya itself and on the Mitakshara, Section 3, Chapter II). I would therefore reverse the decision of the City Civil Judge and remand the suit for fresh disposal as the issues Nos. 4, 5, and 6 have not been disposed of in the lower Court. As however during the course of the arguments, I expressed the view that the question, being an important one of first impression, had better be decided by a Full Bench and as my learned brother also was of a similar opinion, I would refer to a Full Bench for decision the following question of law, namely, "Whether, where an illegitimate son was born of a permanently kept concubine and under the Hindu Law he would be the sole heir or one of the heirs to his putative father's properties, his father could, if the said father survived the illegitimate son, inherit the said son's properties when that son left no widow or issue and his mother had predeceased him". I might add that, if the question is answered in the negative, the logical conclusion which would follow is that the properties escheat to Government.

Napier, J

Napier, J :—I concur.

[The case came on for hearing on 16th and 17th April 1917.]

T. Ethiraja Mudaliar, Vakil for the Appellants.

T. Narasimha Aiyangar, Vakil for the 1st Respondent.

A. K. Madhava Rau, Vakil for Respondents Nos. 1 and 2.

The Court expresssed the following

Wallis, C.

Opinion :—*The Chief Justice* :—The question has been dealt with so very fully by Sadasiva Aiyar, J., in the Order of Reference and in the judgment to be delivered by Kumaraswami Sastri, J., that I shall state my reasons for concurring in the answer proposed by them very shortly. Manu only mentions the right of a Sudra father to give his illegitimate son a share if he chooses, but at the date of Yagnavalkya the illegitimate son was recognised as one of his father's nearest heirs. In the few Slokas (114 to 149) upon which this part of the Mitakshara is a commentary, Yagnavalkya deals first with partition during the father's life-time, and then with partition by the brothers after the father's death. Next he enumerates the twelve classes of sons who are to inherit to the father, each class excluding the subsequent classes and all other heirs. "A legitimate (aurasa) son is one born of a lawfully wedded

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(dharma) wife. Equal with him is the son of an appointed daughter." (Sloka 128). This is the son of a daughter without brothers who had been appointed by the father to remain in his own gotra and to bear sons who were to be regarded as his sons, a possibility which occasioned the numerous warning in the texts against marrying a girl without brothers. These are the first two classes of sons. It is immediately after the enumeration of the twelve classes of sons, and before dealing with the other heirs who are to take "in default of male issue," that Yagnavalkya treats of the rights of the Sudra's illegitimate son as regards partition and succession. On partition during the father's life his share was to be at the father's discretion which was still wide in those times. After the father's death, he was entitled to share with the legitimate brothers, but only to half a share. "If there be no brothers nor daughter's sons, he then takes the whole"—Sloka 134. This would be perfectly logical, if by daughter's sons were meant the sons of the appointed daughter who were equal to the aurasa sons, and I cannot help thinking this was originally so, an inference which is supported by the fact that Medhatithi, as interpreted by Dr. Jolly in his History of the Hindu Law, p. 187, puts the daughter's sons here on the same footing as legitimate sons as regards their shares of inheritance. But, as has been pointed out, the words for daughter's sons used by Yagnavalkya include as well daughter's sons generally who would have no claim to come in preference to the other sons. When we come to the Mitakshara some six hundred years later according to some estimates we find the daughters mentioned as well as the daughter's sons. Much later the Dattaka Chandrika includes the widow; and it is now settled that in the absence of legitimate sons the illegitimate son only takes half if there are widows, daughter or daughter's sons. This looks as if there had been an advancement of these three classes to take along with the illegitimate son. Simultaneously the artificial sons became obsolete with the exception of the dattaka who was admitted to rank with an aurasa son. But, however this may be, it does not affect the fact that from the time of Yagnavalkya onwards the illegitimate son has been an heir to his father and an heir of a very high rank excluding all the subsequent classes of sons which at that time included even the dattaka or son given in adoption. No doubt the general principle was that the inheritance went to th

next sapinda, and that though the relation of sapindaship depended on community of particles it existed at any rate among the higher castes in later times only between persons who were born of a regular marriage, but the texts show an exception to the rule in the case of the illegitimate sons of Sudras who were excluded from the sacramental forms of marriage. This being so, and the illegitimate son being heir to the father, I can see no reason why the father also should not on the usual principle be heir to the illegitimate son in the case put in the order of reference. This view also seems to me to be in accordance with the decision of the Bombay High Court in *Sadu* v. *Baiza and Genu*, [1], which was accepted and acted on by the Privy Council in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing* [2], that an illegitimate son of a Sudra was a member of the family and a co-parcener of his legitimate brother to whose share he succeeded by virtue of the co-parcenership in preference to the brother's widow. It was held that the legitimate brother would take the illegitimate brother's share in the same way. If this be so, it seems to me to involve *a fortiori* that there is no sufficient reason for refusing to allow the father to succeed to the illegitimate son according to the ordinary rule just as the illegitimate son succeeds to the father. My answer is in the affirmative.

Oldfield, J.

Oldfield, J:—I concur in the answer proposed, because such concurrence is in my opinion entailed by the decision in *Jogendro Bhupati* v. *Nityanand* [2]. For the language used in that decision and in *Sadu* v. *Baiza* [1], the judgment in which was apparently endorsed by their Lordships of the Privy Council without reservation, appears to me to entail that a co-parcenary exists between the legitimate and illegitimate sons in virtue of a relationship and not as specially created by the recognition of the latter in the texts for special purposes which they specify, and subject to special limitations, which those purposes imply. Such relationship can be traced only through the affiliation of both sons to their common father; and the result, which must be accepted, is the recognition of the illegitimate son as a son in the most comprehensive sense, subject only to certain disabilities not at present material; and consequently of his father as connected with him by the ordinary paternal relationship. From such a relationship the father's right to inherit from him follows.

1. (1878) I. L. R. 4 B. 37.
2. (1890) I. L. R. 18 Cal. 151.

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As this ground of decision is adequate, I refrain from discussion of the texts or discussion of the reasoning employed in the three cases, which have for many years been accepted as stating the law in this Presidency, *Krishnayyan* v. *Muttusami* [1]; *Ronoji* v. *Kandoji* [2], and *Parvathi* v. *Thirumalai* [3]. I moreover offer no opinion regarding the possibility of reconciling our conclusion in the present case with the well settled course of decisions, by which the illegitimate son's right of succession to collaterals is at present negatived.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J. :—The question referred to us for decision is "whether, where an illegitimate son was born of a permanently kept concubine and under the Hindu Law he would be the sole heir or one of the heirs of his putative father's properties, his father could, if he survived the illegitimate son inherit the said son's properties, when that son left no widow or issue and his mother had predeceased him."

The meaning of the term "Dasi putra" in the texts has been the subject of conflicting decisions, but it is unnecessary to refer to them, as the law, so far as this Presidency is concerned has been settled by the recent decision of the Full Bench in *Soundararajan* v. *Arunachalam Chetty* [4]. In order to entitle an illegitimate son of a Sudra to succeed, all that is necessary is that the connection between his parents should be continuous and neither adulterous nor incestuous.

There can be little doubt that the smritis treat the illegitimate son of a Sudra as one capable of *inheriting* his father's property by virtue of the relationship of father and son subsisting between them. In dealing with the subject of "the partition of heritage" Yagnavalkya in verses 128 to 132 deals with the twelve classes of sons, namely, (1) the Aurasa or the son of the lawfully wedded wife, (2) Putrika Suta or son of the appointed daughter, (3) Kshetraja, the son begotten on a wife by a Sagotra under rules relating to Niyoga, (4) Gudhaja, one secretly begotten in the house, (5) Kanina, the son of an unmarried daughter, (6) Punarbhava, the son of a woman who has been previously married, (7) Dattaka, one who is given in adoption by his father or mother, (8) Krita, a son purchased from his parents, (9) Kritrima, the sons adopted by the man himself, (10) Swayamdatta, one given himself as a son,

1. (1883) I.L. R. 7 M. 407. 2. (1885) I. L. R. 8 M. 557.
3. (1887) I.L.R. 10 M. 334. 4. (1914) I.L.R. 39 M. 136=29 M.L.J. 793.

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(11) Sahodhaja, a son of a woman pregnant at the time of marriage, (12) Apaviddha, a person who has been forsaken by his parents and is adopted as a son. In verse 132 he states that each of the classes of sons is in the absence of the preceding one, the giver of the funeral cake and the inheritor of a share of the property of his father. Then follow verses 133 to 135 which run as follows (I adopt Mandlik's translation):—The law is propounded by me in regard to sons equal by class. A son begotten on a dasi by a Sudra becomes even the partaker of a share by the father's choice, after the death of the father the brother should make him a half-sharer. An illegitimate son of a Sudra if brotherless can take the whole unless there is a son to any of the daughters of the Sudra. Then follow the well-known Slokas 135 and 136 which form the basis of the law of inheritance to sonless Hindus and which run as follows:—"The wife, daughters, both parents, brothers and likewise their sons, gotrajas, bandhus, a pupil and a fellow-student. Of these on failure of the preceding the next following in order is heir to the estate of one who has departed for heaven leaving no son (putra). This rule extends to all classes.". Then follows Sloka 137 which prescribes a special rule as regards a hermit, an ascetic and a student. Other writers describe as many as seventeen classes of sons, but it is not necessary to refer to them.

Turning to Manu who deals with the subject of inheritance in Chapter IX we find that he describes twelve classes of sons in verses 166 to 177 and in verse 179 states that "a son who is begotten by a Sudra on a female slave or the slave of his slave may, if permitted by his father, take a share of the inheritance." Verse 180 runs as follows (I adopt the translation given in the Sacred Books of the East):—These eleven, the son begotten on the wife and the rest as enumerated above, the wise call substitutes for a son taken, in order to prevent a failure of the funeral ceremonies. Verse 181 states that sons begotten by strangers belong in reality to him from whose seed they sprang, but not to the man who took them. Verses 182 and 183 refer to a son of uterine brothers (who is said to be the son of all) and to a son of one of several wives who is said to be the son of all the wives. Verses 184 and 185 run as follows:—on failure of each better son each next inferior is worthy of the inheritance; but if there be many of equal rank they shall all share the estate (184). Not

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brothers, nor fathers, (but) sons take the paternal estate; but *the father shall take the inheritance of a son who leaves no male issue, and his brothers* (185). It is clear that Manu declares the father of each class of sons enumerated by him above to take the inheritance of the son who dies leaving no male issue.

It will be observed that both Manu and Yagnavalkya deal with the dasiputra of a Sudra immediately after the twelve classes of sons and the context shows that the dasiputra was treated as the son of a Sudra and placed on a footing superior to the illegitimate son of the twice-born classes by being given a share on a partition between himself and his brothers and also the right to share with the daughter's son, and to take the whole estate in the absence of sons and daughter's sons. But for this special provision the illegitimate son of a Sudra would take only in default of all aurasa and putrika putra or other sons classed by the smriti writers as superior and the fact that a special text was necessary to give him a favourable position cannot in my opinion be treated as showing an intention to exclude him from the category of sons whom the smriti writers mention as capable of inheriting to their father. As the verses in Manu and Yagnavalkya dealt with sons common to all the four castes (with the reservation that marriage or concubinage between a woman of higher caste with a man of the lower caste was strictly forbidden) a special rule has to be introduced in order to give the son of a Sudra by a concubine the right which no other illegitimate son had, namely, that of getting a share with the legitimate son, daughter and daughter's son and in their absence of succeeding to the whole estate in preference to his father's brother and agnates. There is no reason to suppose that the smriti writers attached any special stigma to the illegitimate son of a Sudra by a dasi as a reference to the twelve kinds of sons allowed to the twice-born classes shows that several of them can by no stretch of imagination be said to be the legitimate sons of their father or even to induce a *prima facie* belief as to the father being the author of their being. Manu, Gautama, Vasishta, Bodhayana and other smriti writers of undoubted eminence who placed the Gudhaja or son of concealed birth in the first group of six sons who are said to be "heirs and kinsmen" would hardly have refused heirship or kinsmanship to the son of a Sudra born of a connection which had a greater element of certainty as to paternity about it. It is also extremely unlikely that so far as

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Sudras were concerned the smriti writer would have treated the absence of a marriage between a Sudra and the "dasi" as any very serious matter. In dealing with the various forms of marriage they state that the lowest forms (Asura, Rakshasa, Gandharva, Paisacha) which can by no pretence be said to be anything but pure concubinage were intended for Sudras (see Gautama, Chapter 19; Baudhayana, Chapter II). The Grihya Sutras prescribe no Vedic ritual to be observed in the case of marriages amongst Sudras; and Yagnavalkya in Chapter II, sloka 10 expressly states that the vedic rites beginning from conception and ending with the burning ground were for the twice-born classes alone. Far from treating the illegitimate son as a bastard without rights of inheritance smriti writers placed him in a very favourable position and almost equal to the Aurasa or Dattaka son. Jimutavahana gives the reason fort he illegitimate son of a Sudra sharing with the legitimate daughter's son as follows "since the one though born of an unmarried woman is the son of the owner and the other though sprung from a married woman is only his daughter's son." A similar explanation is given by Raghunandana in his Dayatatwa. Brihat Parasara while laying down the general rule that the illegitimate son is only the son of the mother makes an exception in the case of Sudras and observes the son by a slave of a Sudra is the fulfiller of desire and offers the pinda. Twelve sons are mentioned by the rishis. They are offerers of the pinda one after the other in the order mentioned. Balambhatta in his commentary states that the use of the word *Haret* in the text of Yagnavalkya indicates that the illegitimate son acquires a right by birth like the legitimate son. Raghunandhana in his Dayatatwa explains the word *Amsa* (share) as meaning "a share equal to that of other sons." Both his relationship by propinquity to his putative father and his right to offer funeral oblations are nowhere disputed. A consideration of the position assigned to the illegitimate son of a Sudra when compared to that of illegitimate sons of other classes fully bears out the view of Seshagiri Aiyar, J. in *Meenakshi* v. *Muniandi Panikkan* [1], that "in cases of Sudras continuous concubinage was regarded as equivalent to marriage, although the children of such irregular union did not rank equally with those with whose mother there was a formal marriage" —a view in which Sadasiva Aiyar, J. concurred in *Soundararajan* v. *Arunachalam Chetty*, [2]. ...

1. (1914) I. L. R. 38 M. 1144 at 1149=27 M. L. J. 353.
2. (1915) I. L R. 39 M. 136 at 152=29 M. L. J. 793.

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The position accorded to the illegitimate son in the scheme of succession and the place where his rights dealt with by Manu and Yagnavalkya and also the fact that Vignaneswara in the Mitakshara deals with the rights of the illegitimate son at the end of the chapter relating to Apratibandhadaya or inheritance by indefeasible right strongly support the view taken by West and Buhler and concurred in by Bhashyam Aiyangar, J. in *Ramalinga Muppan* v. *Pavadi Goundan* [1], that the position of an illegitimate son of a Sudra is more analogous to that of a legitimate son than to that of relations who inherit by right liable to obstruction. His position so far as the Smriti writers are concerned is by no means inferior to that of a Dattaka. The Smritis clearly assume that there is heritable blood between the illegitimate son of a Sudra and his putative father. There is nothing so far as I can see in the Smritis to support the argument of Mr. Narasimha Aiyangar based largely on the observations in *Ranoji* v. *Kandoji* [2], and *Parvathi* v. *Thirumalai* [3], that the share of the illegitimate son was given in lieu of maintenance and that he was treated as a person having no *legal connection* with the family of his illegitimate father but only as an outsider a *quasi nullius filius* who was given something because of the moral right which he had, to be supported by the author of his being. Why a share should have been given to the Sudra illegitimate son while the sons of the twice-born were given only an allowance for maintenance or why the right in lieu of maintenance should have taken the form of the right to share with the natural son, the widow, daughter and daughter's son and to get the whole estate of his divided putative father in their absence (cutting out the father's legitimate brothers and other collaterals) has not been explained and it seems to me is not possible of any satisfactory explanation.

The authorities show that the illegitimate son was always considered as *inheriting* to his putative father. Vignaneswara distinctly states that all classes of sons without exception have the right of inheritance to their father's estate because of the text of Manu "Not brothers, nor parents, but sons are the heirs to the estate of the father" (Manu, Chapter IX, verse 185). In *Pandiya Telaver* v. *Puli Telaver* [4], Scotland, C. J., observed that the Hindu Law does not like the English Law consider an illegitimate son *quasi*

1. (1902) I.L.R. 25 M. 519 at 524. 2. (1888) I. L.R. 8 M. 557 at 563.
3. (1887) I. L R. 10 M. 334 at 345. 4. (1863) 1 M. H. C. R. 478.

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nullius filius and that in the case of Sudras illegitimate sons succeed to their father by right of inheritance. In *Venkataraman* v. *Venkatalakshmi Ammal* [1] a similar view was taken and illegitimate sons of a Sudra were declared entitled to rights of survivorship *inter se*. All the Sastries consulted by the Chief Justice had not the slightest doubt that "where illegitimate sons succeeded to their father, the brothers will succeed to one another living and dying undivided." All the subsequent cases which deal with the rights of an illegitimate son deal with his rights as based on inheritance to his putative father whatever the view taken as to his rights to succeed to the putative father's collaterals. So far as the mother is concerned no doubt has ever been cast on the decision in *Mayna Bai* v. *Uttaram* [2], that illegitimate brothers succeed not only to their mother *but to each other*.

The position of an illegitimate son was considered in *Sadu* v. *Baiza* [3], and it was held that when a legitimate and an illegitimate son succeed to the property of their father they take as coparceners and that the share of the legitimate son who leaves no male issue passes by survivorship to the illegitimate son. In dealing with the position of an illegitimate son Nanabhai Haridas, J., after setting out the arguments advanced against him and stating the disabilities he was under observed as follows "While admitting therefore that the position of a dasi-putra in a Sudra family does differ in important particulars from that of an aurasa putra, I am not prepared to allow that the former is not a member of the family at all, nor that he is not a co-parcener, and not, therefore, entitled to succeed by right of survivorship. His legal status as a son is unquestionably recognised and accordingly he inherits from his father even before the latter's widow; and if there are aurasa putras of his father, he succeeds to the father's estate jointly with them. He is clearly, therefore, their co-parcener. That he is their brother, not only in the popular, but also in the legal acceptation of the term is evident from the Mitakshara, Chapter 1, S. XII, 1, 2, where they are spoken of both by Yagnavalkya and Vignanesvara as brethren and brothers (bhratarah)." Westropp, C. J., while agreeing with the view taken by Nanabhai Haridas, J. emphasised the fact that the dasi-putra was dealt with by the author of the Mitakshara before he treats of obstructed heritage, *i. e.*, the rights of succession on

1. 2 Strange Rep. of Cases 186. 2. (1864) 2 M. H. C. R. 196.
3. (1878) I. L. R. 4 B. 37.

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failure of sons, primary or secondary, treating the dasi-putra as amongst these in the case of Sudras. In *Ranoji* v. *Kandoji* [1] Muthuswami Aiyar, J., (at page 562) while referring to this contention was inclined to the view that no inference can be drawn from this fact as the passage introduced a special rule and the share given to the illegitimate son was given to him in satisfaction of the claim to maintenance which he had at one time in common with the illegitimate sons of the twice-born classes. With all respect an examination of the Smritis shows that there is nothing in them to support the view as to the share being given in lieu of maintenance or to suggest that at some period the illegitimate son's rights were enlarged he being given a share in lieu of maintenance. An examination of the development of Hindu Law as to the various forms of marriages and the twelve classes of sons shows that greater importance was being gradually attached to marriage and legitimacy and that even in the time of Manu and Yagnavalkya distinction based on these considerations were drawn between the various classes of sons. It is hardly likely that if the Sudra illegitimate son was not in the pale of heirs at any anterior period he would have been given the extensive rights conferred, in lieu of a bare right of maintenance. On the contrary there is considerable force in the observation of Sadasiva Aiyar, J., in the order of reference that "in ancient Hindu Law he came in as one of the twelve classes of sons and that his being allowed afterwards only to share with the widow, daughter and daughter's sons instead of inheriting his father's estate wholly was a development of the later Smritis and commentators".

In *Jogendro Bhupati* v. *Nityanand* [2], their Lordships of the Privy Council following *Sadu* v. *Baiza* [3], held that amongst Sudras governed by the Mitakshara the legitimate and the illegitimate sons took by survivorship and that consequently the illegitimate son succeeded to an impartible estate by rights of survivorship in preference to the widow of the legitimate son. As their Lordships state that the same rules apply to impartible estates as to partible estates for determining who is the heir, the fact that they were dealing with an impartible estate makes no difference. It appears from the report that Mr. Arathoon, Counsel for the

1. (1885) I. L. R. 8 M. 557. 2. (1890) I. L. R. 18 C. 151.
3. (1878) I. L. R. 4 B 37.

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appellants referred to the Madras decisions reported in *Krishnayyan* v. *Muthusami* [1], and *Ranoji* v. *Kandoji* [2], where a contrary view was taken to that in *Sadu* v. *Baiza*, [3] but their Lordships of the Privy Council, after referring at some length to the judgment of Nanabhai Haridas, J., and Westropp, C. J., in *Sadu* v. *Baiza* [3], followed the decision.

I am of opinion that the effect of the decision of the Privy Council is to settle the law as propounded by Nanabhai Haridas, J., and to make the illegitimate son a member of the family of his putative father capable of inheriting to his father and succeeding to his legitimate brother's share by right of survivorship. It is difficult to see how there can be a *co-parcenary under the Mitakshara* with its necessary incidence of survivorship between two *males* who cannot for want of heritable blood be heirs to each other or to the person whose estate they inherit. The effect of the decision has been thus summarized by Bhashyam Aiyangar, J., in *Ramalinga Moopan* v. *Pavadai Goundan* [4]: "If the legitimate son dies without leaving male issue, the illegitimate son becomes entitled to the whole estate. If the illegitimate son predeceases the legitimate son, leaving male issue and the legitimate son afterwards dies without leaving male issue, the whole property will devolve by survivorship, on the issue of the illegitimate son. This must be the necessary result if, as affirmed by the Privy Council, the legitimate and the illegitimate sons on the death of the father hold the family property as members of a joint family."

The rights of an illegitimate son and his position in the family of his putative father received a further extension in *Ramalinga Moopan* v. *Pavadai Goundan* [4], where it was held that in cases where an illegitimate son predeceases his putative father the illegitimate son's son would be entitled to a share as against the deceased brother of his grand-father as representing his father who if he had survived would have been entitled to a share.

Sir Bhashyam Aiyangar, J., was of opinion that a Sudra illegitimate son's right of inheritance was not contingent but absolute as in the cases of a legitimate son and that he was in a position more analogous to that of a legitimate son than that of other relations whose right of inheritance is liable to obstruction.

1. (1884) I. L. R. 7 M. 407.
2. (1884) I. L. R. 8 M. 557.
3. (1879) I. L. R. 4 B. 37.
4. (1902) I. L. R. 25 M. 519 at 528.

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So far as competition between the illegitimate son and the widow of his putative father is concerned the view taken by Muthuswami Aiyar, J., in *Parvathi* v. *Thirumalai* [1], that she excludes the illegitimate son is, having regard to the decisions in *Chinnamal* v. *Varadarajulu* [2], and *Meenakshi Anni* v. *Appakutti* [3], (which hold that they divide the estate equally), no longer good law.

I am of opinion that the illegitimate son of a Sudra is one of the classes of sons recognised by Hindu Law and allowed to a Sudra in addition to the twelve classes of sons enumerated as common to all the four castes. In the case of Brahmins, Kshatriyas and Vysyas the classes of sons enumerated in verses 128 to 132 of Yajnavalkya and 166 to 177 of Manu except the Aurasa and Dattaka sons are obsolete, and in the case of Sudras they have in addition to the Aurasa and Dattaka a third class of sons, namely, the 'dasi-putra.' It seems difficult to see why under verse 185 of Manu in which succession is provided for in the case of the son dying issueless, the right of the father's illegitimate son should not be established, especially as verse 184 refers to sons of *all classes* succeeding to the estate in order of rank.

Where an illegitimate son of a Sudra dies, succession to him has to be traced according to the rules laid down as regards Apratibandha and Sapratibandha daya as he is capable of inheriting and of transmitting heritable blood. If he has a legitimate issue or illegitimate sons who will satisfy the conditions of 'dasi-putras', they succeed. In their absence the same rule should be applied as to the case of legitimate sons in the rules contained in verses 135 and 136 of Yajnavalkya and his putative father who is his 'pita' in the legal and ordinary acceptance of the term would succeed. In the preceding verses the word 'pita' is used in reference to sons whose mothers were not married to the fathers and different classes of sons are enumerated. There is nothing to indicate that the word 'pita' in those verses was to be confined to the father of an Aurasa or Dattaka son and there is no reason why such a limitation should be imported into the meaning of the word in verses 135 and 136.

It has been argued strenuously by Mr. Narashimha Aiyangar that an illegitimate son has not been specially mentioned in

1. (1887) I. L. R. 10 M. 334. 2. (1892) I. L. R. 15 M. 307.
3 (1909) 20 M. L J. 859.

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Chapter II dealing with succession to a sonless Hindu and reference has been made to *Shomi Shankar Rajendra Varere* v. *Rajesar Swami Jangam* [1]. I do not think any inference against the illegitimate son can be drawn from the omission as in my opinion the illegitimate son of a Sudra was already referred to in the chapter dealing with the unobstructed heritage and having been included in the category of sons there was no reason for making any special mention of an illegitimate son of a Sudra in dealing with the heirs of a person who left no sons. If the illegitimate son of a Sudra was treated as a person who is a mere outsider and not a member of the family of his father, his exclusion in Chaptar II may be a ground for not applying the rule of succession therein stated to him, but if his position is that stated by Haridas, J. in *Sadu* v. *Baiza*, [2] it is difficult to see why separate mention is necessary.

I am of opinion that so far at least as the father is concerned the word *pita* should, for the purposes of tracing succession to the illegitimate son of a Sudra who is a "dasiputra," be taken to include a putative father. It is unnecessary to determine whether such a son is the "sapinda" of his father so as to enable him to inherit to other collaterals assuming that sapinda relationship can only exist in the case of a valid marriage. Vignaneswara in dealing with the twelve classes of sons observes that the division of sons into two classes, the first six being heirs and kinsmen and the latter six kinsmen and not heirs must be "expounded as signifying that the first six may take the heritage of their father's sapindas and samanodakas if there be no nearer heirs but not the last six" and adds that *as regards however consanguinity and the performance of the duty of offering libations of water and so forth,* both classes of sons are equal. The Saraswati Vilasa describes all the twelve classes of sons as *sapindas* of their father. As between *the illegitimate son and his putative father* filial relationship exists in my opinion for all purposes of inheritance and succession. It would be unreasonable to place the dasi-putra in a worse position than the Gudhaja who is classed amongst heirs and kinsmen. The fact that the Gudhaja is now obsolete is no ground for cutting down the rights of the dasi-putra whose sonship is recognised in the Kali Age. The fact that the word pita or pitarau is wide

1. (1898) I. L. R. 21 A. 99 at p. 102. 2. (1879) I. L. R. 4 B. 37.

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enough to include the putative father owing to special considerations does not *necessarily* imply that a dasi-putra becomes *ipso facto* the preferential heir of all his father's collaterals in case of competition between him and the agnates of his father.

So far as collateral succession is concerned all the Courts have held that an illegitimate son is not the heir to his *putative father's collateral relations*. The ground on which the exclusion is based is that the rule which guides collateral succession is based on the text of Manu as to the inheritance going to the nearest sapinda and as consequently excluding an illegitimate son as sapindaship presupposes a lawful marriage. A long catena of cases beginning from *Nissar Murtojah* v. *Kowar Dhunwunt Roy*, [1] decided so long ago as 1863 have taken this view. There is considerable force in the view taken by Sarwadhikari in his learned treatise on the Law of Inheritance that all the analogies of Hindu Law are in favour of allowing him the right of succession to collaterals. Were the matter *res integra* and the case were one of first impression to be decided on a consideration of the Smritis and Commentaries, I would be inclined to hold with my learned brother Sadasiva Aiyar, J., that the illegitimate son of a Sudra is for the purpose of inheritance to collaterals in the same position as his Aurasa son. The current of authorities against the view is very strong. I need only refer to *Krishnayyan* v. *Muttusami* [2], *Ranoji* v. *Kandoji* [3], *Parvathi* v. *Thirumalai* [4], *Shome Shankar Rajendra Varere* v. *Rajesar Swami Jangam* [5], *Ramalinga Moopan* v. *Pavadai Goundan* [6], and I consider it unnecessary for the purpose of this reference to dissent from them.

Even assuming that the order of succession to a sonless Hindu given by Manu and Yajnavalkya and propounded by Vignaneswara in Chapter II, Section 1, pl. 2 of the Mitakshara would not *in terms* apply owing to the word '*pita*' being confined to the legitimate father, and to the want of sapinda relationship between a Sudra and dasiputra, I see nothing to prevent succession to the illegitimate son being traced by analogy to the rule laid down in verses 135 and 136 of Yajnavalkya as explained in Chapter II, Section 1, pl. 2 of the Mitakshara especially as the Hindu Law recognises heritable blood between a Sudra and his dasi-putra and Manu states that the

1. (1863) Marshall's Reports 609.
2. (1884) I. L. R. 7 M. 407.
3. (1884) I. L. R. 8 M. 557.
4. (1887) I. L. R. 10 M. 334.
5. (1898) I. L. R. 21 A. 99.
6. (1902) I. L. R. 25 M. 519.

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father of every one of the classes of sons enumerated by him succeeds to the property of the heirless son. The whole law of succession to dancing girls and prostitutes in cases not expressly provided for by the rules relating to Streedhana has been built up by Courts on analogies furnished by other parts of the Hindu Law. In *Kamakshi* v. *Nagarathnam*, [1] Scotland, C. J. and Collet, J. held that in the absence of any positive rule relating to the particular kind of property in dispute (the hereditary office of dancing girls attached to a temple) the law to be applied is the general law of inheritance regarding daughters or sons. In *Subramania Mudali* v. *Balakrishna Naidu* [2], Abdur Rahim and Sreenivasa Aiyangar, JJ. in dealing with the question of heirship to a dancing girl whose grand-mother was the issue of a marriage between her parents observed as follows: "The rules of Streedhana obviously do not apply to such property and there is no other rule of succession laid down in the Smritis or the commentaries prescribing the devolution of property of a woman of this caste, except it be the general rule that to the nearest sapinda the inheritance next belongs." They acted on analogies and held that the great grand-father's brother's daughter succeeded in preference to her great grandfather's daughter's son. The argument that the analogy afforded by sapinda relationship cannot be applied as there was no marriage is met by the observations that according to Vignaneswara sapinda merely connotes relationship and reference is made to the Acharadhyaya of the Mitakshara, (the commentary of Vignaneswara on verse 52). In *Venku* v. *Mahalinga* [3] Muthuswami Aiyar, J. was of opinion that in the case of adoptions by dancing girls questions as to inheritance and collateral succession should be adjudicated upon in the absence of a positive rule of law to the contrary with reference to the custom of the caste *and the analogies of Hindu Law* as indicated in *Kamakshi* v. *Nagarathnam* [1]. In *Ramalinga Moopan* v. *Pavadai Goundan* [4], Bhashyam Aiyangar, J. rested the right of representation of the legitimate son of an illegitimate Sudra on the analogy of legitimate sons and grandsons and observed : "The principles, therefore, applicable to the succession of sons and grand-sons of legitimate sons may by analogy be applied to the sons and grand-sons of an illegitimate son, *viz.*, that they should be considered capable of representing

1. (1868) 5 M. H. C. R. 161. 2. (1917) 33 M. L. J. 207.
3. (1888) I. L. R. 11 M. 391. 4. (1902) I. L. R. 25 M. 519 at p. 524.

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the illegitimate son and in case he dies before his father, of taking the share which would have fallen to him if he had not so died." Though there are no texts in the Smritis expressly recognising the right of an adopted son to inherit to his adoptive mother's relations Courts have enforced the right on general principles of equity and good conscience and analogy to the right of the aurasa. The principle of atidesa whereby principles laid down with reference to one case are applied to other analogous cases was recognised by Jaimini in his Mimamsa. (Books VII and VIII of Jaimini's Mimamsa).

Reference was made during the argument to the doctrine of reciprocity and it was argued that if the illegitimate son of his father was an heir to his putative father (as he undoubtedly is under Hindu Law) there was no reason to hold the converse not to be true. I think there is considerable force in the argument. Except in the case of females who come in only under special texts and the hermit, ascetic and brahmachari referred to in verse 137 I have not been referred to any instance where heritable blood is recognised between persons *who could not be the heirs of each other*. Where therefore a text expressly declares that a male is the heir of male, there is, in the absence of anything to the contrary in other texts, nothing to prevent the converse rule from being applied as a rule of equity and good conscience even though the case is not specially provided in the texts so long as there is nothing against it in the Smritis.

I would for the foregoing reasons answer the question referred in the affirmative.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS,

PRESENT:—MR. JUSTICE ABDUR RAHIM, MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE NAPIER.

K. S. Rm. Ramanathan Chetty and others. *Appellant * (Plaintiffs).*

v.

Ranganathan Chetty, and others. *Respondents (Defendants Nos. 2 & 3 and a legal representative of the deceased 1st defendant).*

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Estoppel—Exchange of land—Unregistered instrument—Erection of costly buildings—Actings of the parties—Part performance—Acquiescence—Equitable Estoppel—Invalid transfer—Ejectment—Right to Compensation—Transfer of Property Act. Ss. 51, 54 and 118.

* L. P. A. No. 219 of 1916. 4th May, 1917.

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The plaintiffs and the defendants, by an unregistered instrument agreed for mutual convenience to an exchange of certain plots of land forming part of their adjoining house-sites. More than a year after the transaction, the defendants erected a costly building on the land which fell to them under the instrument and while the building was in progress the plaintiffs not only kept quiet but received an additional sum from the defendants on the ground that the land that fell to the share of the latter was larger in extent. Subsequently the plaintiffs sued to eject the defendants on the ground that the instrument of exchange being unregistered did not pass title.

Held, per *Sadasiva Iyer and Napier, JJ.*, (*Abdur Rahim, J.*, dissenting) that the plaintiffs were entitled to a decree for ejectment subject to the liability to pay compensation for improvements, to the defendants.

There was no room for the application of the doctrine of estoppel by acquiescence in the case, having regard to the fact that both at the time when the erection of the building was going on and at the time when they received the money as compensation for the deficiency in area, the plaintiffs were not aware of their subsisting right and its infringement by the action of the defendants, but had acted in the full belief that they (plaintiffs) had no longer any title to the land they had parted with.

The defendants having erected the buildings on the land, without in the least believing that the plaintiffs were the owners of the site or that they (defendants could build only with plaintiffs' consent, express or implied, it was impossible to infer a license in favour of defendants by the plaintiffs to build with permanent rights over the site and the building.

In England the doctrine of part performance belongs to the sphere of contract and operates, where applicable, to allow a party to prove a contract in an action, in spite of a statutory prohibition. In India however, neither the doctrine of part performance nor the doctrine that "Equity regards that as done which ought to be done" can be invoked so as to effect a valid transfer of immoveable property without a registered instrument in cases where such instrument is required by S. 54 of the Transfer of Property Act.

The word "transferee" in S. 51 of the Transfer of Property Act includes also a transferee under an invalid transaction of transfer and the words "the person causing the eviction" include also the transferor under an invalid transaction of transfer.

Per *Sadasiva Aiyar, J.*—Where B believing that he is the absolute owner, erects buildings on land purported to be transferred to him by A, under an invalid instrument, B has only one of two rights, *viz*., either to have the value of the improvements made by him estimated and paid by A, the evictor or to require A to sell his interest in the property to him at the then market value irrespective of the building. The option however, is with A, the person entitled to evict.

Per *Abdur Rahim, J.*:—Under the circumstances, the equities in favour of the defendants were a sufficient answer to the plaintiffs suit for ejectment. What are the circumstances which should be sufficient to raise an equity that would be an answer to a suit for possession by a person who purported to convey the property by an unregistered instrument must depend on the facts of a particular case; but they must be such as should have altered though not irretrievably the position of the defendant acting on the faith of the bargain sought to be resiled from.

The plaintiffs by reason of the contract to exchange having been fully performed and having stood by and acquiesced in the defendant's building and received a further payment were estopped from ejecting the defendants. The

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doctrines of part performance and estoppel by acquiescence were fully applicable to the circumstances of the case so as to effectually bar the plaintiffs from enforcing their claim.

The existence of estoppel does not depend on the motive or knowledge of the matter, on the part of the person making the representation. It is not essential that the intention of the person whose declaration, act or omission has induced another to act or to abstain from acting should have been fraudulent or that he shall not have been under mistake or mis-apprehension.

[Decision of Seshagiri Iyer, J. in *Ramanatham Chetti* v. *Ramaswami Chetty* [1] affirmed.]

Appeal under Clause 15 of the Letters Patent against the judgment of the Honourable Sir John Wallis, Chief Justice, dated 4th November 1915 in Appeal No. 20 of 1913, preferred against the decree of the Court of the Subordinate Judge of Ramnad at Madura in Original Suit No. 94 of 1911.

The Hon. The Advocate General (*S. Srinivasa Aiyangar*) with *K. Raja Aiyar* for Appellants.

T. R. Venkatarama Sastri for *A. Krishnaswami Aiyar* for Respondents.

The Court delivered the following

Abdur Rahim, J.

Judgments:—*Abdur Rahim, J.*:—The question raised by this Letters Patent Appeal is one of considerable importance and difficulty. It is, to put it shortly, how far it is open to the Court to refuse to recognise the title of the plaintiffs—appellants suing to recover immoveable property of the value of more than Rs. 100 which they purported to convey to the defendants—respondents by an unregistered document, on the ground that the transfer has been acted upon by the latter who spent considerable money in erecting valuable buildings on the land, with the knowledge of and encouraged by the appellants. The facts are sufficiently set forth in the judgments * of the learned Chief Justice and Seshagiri Aiyar, J., who took different views and it is unnecessary to repeat them in detail. The result of the findings is that at the time of the transaction in question, which was an exchange of two plots of land between the appellants and the respondents, both the parties believed that the document evidencing the exchange did not require registration. Possession was taken by each party of the plot received by him under the exchange. The respondents erected a building which cost about Rs. 40,000 placing the wall of this building on one side on the land which they had got in exchange, and the appellants during the time the building was in

* For facts see the report 1. (1915) 30 M. L. J. 1.

progress also demanded and obtained a sum of Rs. 525 from the respondents as compensation on the allegation that the land which they had parted with was larger in quantity than the land which they had received from the respondents. It is further found that the objects of the appellants in instituting the suit to recover the land which belonged to them before the exchange and which they say still belongs to them notwithstanding the attempted transfer is not so much to benefit themselves as to injure the respondents. The question for decision, however, is one purely of law, *viz.*, whether, under the circumstances, the equities in favour of the defendants are a sufficient answer to the plaintiffs' suit for ejectment.

The effect of Ss. 54 and 118 of the Transfer of Property Act on what has taken place in this case is, that Exhibit B which is described as an agreement of exchange is ineffectual to create a valid transfer of the plaintiffs' land, and by reason of S. 49 read with S. 17 of the Registration Act that document cannot be held to affect the right of the appellants to the property in dispute.

On behalf of the appellants it is argued that their title to the property remains and as the suit is within time, to refuse their claim for recovery of the land will be virtually nullifying the enactment of the legislature the effect of which is to preserve the title in them in spite of what has taken place. The answer to this argument on behalf of the respondents is that in none of the enactments referred to, does the legislature purport to deal with the question of rights based on equities arising from the actings and conduct of the parties. It is argued that it is open to the court to say to the appellants, "It is true that your rights in the property have not been transferred to the respondents by the instrument in question but having regard to what has taken place it will be fraudulent on your part to set up your legal title against the respondents and the Court will not help you to perpetrate the fraud."

Such an answer to the suit is, in my opinion, in accord with well recognised equitable principles, of the application of which there are many instances in the law.

One of them is the doctrine of part performance by which the operation of the Statute of Frauds in England is prevented from being used for purposes of committing fraud. The Statute of Frauds provides that "no action shall be brought whereby to charge

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any person upon any contract or sale of land...........unless the agreement...........shall be in writing...........&c." No doubt it has been held that this provision relates to procedure, but as it has been pointed out by Fry, L. J. in his book on Specific Performance, it really goes to the solemnities of the contract. (See paragraph 497, page 254). It is not necessary for the application of this equitable doctrine that there should have been a fraudulent conception from the beginning. It is sufficient if the circumstances render it a fraud on the part of the party relying on the statute to take advantage of the fact that the bargain was not recorded as required.

I fail to understand why this equitable rule should not be applied to a transaction purporting to be a transfer in pursuance of a valid contract. On the other hand, there would seem to be less difficulty in applying the doctrine in such cases than where its aid is sought to compel the defendant to carry out a parol contract in spite of a Statute which says that no action shall be brought to enforce such a contract. Further if a defendant can be debarred because of his conduct from setting up a statutory defence it should be easier to uphold the defence to such a suit as this on the ground that although the transfer which the appellants purported to make to the respondents was invalid, it would be inequitable on their part, having regard to the fact that the latter have acted upon it in such a way as to alter their position to resile from the bargain to the prejudice of the respondent.

The question, how far the actings of parties can be allowed to effect the application of S. 54 of the Transfer of Property Act to cases of this class was discussed by a Full Bench of this Court in *Kurri Veerareddi* v. *Kurri Bapireddi* [1], where the previous rulings on the subject were considered in detail. The law as laid down there would undoubtedly be binding on us unless, as suggested by the learned Chief Justice, the pronouncements of the Privy Council in a later case in *Mahomed Musa* v. *Aghore Kumar Ganguli* [2], make it necessary that we should reconsider that ruling. It was held by the Full Bench that "a contract of sale followed by delivery of possession does not, when there is no registered sale, create any interest in the property agreed to be sold and cannot,

1. (1904) I. L. R. 29 M. 336. s. c. 16 M. L. J. 395.

2. (1914) I. L. R. 42 C. 801: 28 M. L. J. 548.

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even if enforceable at date of suit or decree, be pleaded in defence to an action for ejectment by one having a legal title to recover." Then, there are general observations in the judgments delivered by the learned Judges in which the duty and expediency of giving full effect to the words of the Statute is emphasised as against recognition of equities modifying the application of the Statute Law.

So far as it holds that delivery of possession under an unregistered instrument of sale is not a sufficient answer to a suit by the vendor to recover possession, I am not prepared to express any doubt on the correctness of the ruling. The Transfer of Property Act contemplates sales being effected in some cases by delivery of possession and in others only by a registered instrument, and to hold that in cases of the latter class where the legislature insists on a registered instrument, mere delivery of possession would be sufficient would be going directly against the wishes of the legislature. (See *Lalchand* v. *Lakshman* [1], and *Jagadbandu Saha* v. *Radha Krishna Pal* [2]). Even with reference to the rulings under Statute of Frauds, Lord Blackburn said in *Maddison* v. *Alderson* [3], that if the matter were *res integra* he would not go so far as to hold that delivery of possession of the land would take the case out of the statute. And it is possible that too many exceptions have been allowed to the operation of the Statute of Frauds (see Story's Equity Jurisprudence, Ss. 765 and 766). However that may be in cases where owing to his own conduct it would be clearly inequitable or fraudulent for a party to insist upon his legal rights, it is the duty of the Court of Equity to give relief to the other party who has suffered by such conduct. So far Lord Blackburn entertained no doubt. He says "the conduct of the parties may be such as to make it inequitable to refuse to complete a contract partly performed. Wherever that is the case I agree that the contract may be enforced on the ground of an equity arising from the conduct of the party." That seems to be in accord with what is laid down by the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* [4], *Venkayamma Rao* v. *Appa Rao* [5], and in an earlier case in *Immudipattam Thirugnanakondama Naick* v. *Periya Dorasami* [6].

1. (1904) I. L.R. 28 Bom. 466.
2. (1909) I. L. R. 36 Cal. 920.
3. (1883) L. R. 8 App. Cas. 467.
4. (1914) I. L. R. 42 Cal. 801. P.C.
5. (1916) I L. R. 39 Mad. 509 : 31 M. L. J. 58 P.C.
6. (1900) I. L. R. 24 Mad. 377.

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Before dealing with the Privy Council decisions, however, I shall mention the case *H. Young and Co.* v. *Mayor and Corporation of Royal Leamington Spa* [1] where it was held that a contract entered into by an urban authority but not under seal as required by a Statute did not bind the Corporation and therefore the plaintiff who had carried out certain works in pursuance of such an agreement could not recover the value of what he had done. But the basis of this decision was that the Corporation could exercise statutory power to enter into contracts only by the observance of certain solemnities, that is, the affixing of the seal, intended for the protection of rate-payers and there was no room therefore in such a case for the operation of the equitable doctrine of part performance. What are the circumstances which should be sufficient to raise an equity that would be an answer to a suit for possession by a person who purported to convey the property by an unregistered instrument must depend on the facts of a particular case. But they must be such as should have altered though not irretrievably the position of the defendant acting on the faith of the bargain sought to be resiled from. If the effect of *Immudipattam Thirugnana Kondama Naick* v. *Periya Dorasami* [2], be that even in such cases the plaintiff is entitled to eject the defendant I venture to think as I shall show presently that it is no longer good law after the pronouncements of the Judicial Committee in *Mahomed Musa* v. *Aghore Kumar Ganguli* [3], and *Venkayyamma Rao* v. *Appa Rao* [4]. Nor is the proposition laid down in the Full Bench case, namely that even where a valid contract of sale in favour of the defendant is proved, that would not be a sufficient defence to a suit in ejectment in such cases any longer tenable.

The case of *Mahomed Musa* v. *Aghore Kumar Ganguli* [3], related to transactions which took place before the passing of the Transfer of Property Act; there is thus no question of the actual decision in that case being applicable here. But their Lordships of the Judicial Committee while pointing out the fact that no written conveyance was necessary by the law of India, considered it desirable to lay down certain principles of general application which, as I understand their judgment, would not be affected by any such enactment as the provision of the Transfer of Property

1. (1883) L. R. 8 A. C. 517.
2. (1900) I. L. R. 24 M. 377
3. (1914) I. L. R. 42 C 801.
4. (1916) I. L R. 39 M. 509

Act requiring certain classes of transfer to be in a particular form. They observe: "To use language common from very early times in Scotland, and highly approved in the case of *Maddison* v. *Alderson* [1], in the House of Lords, it is no doubt true that there is a *locus penitentiæ*, that is, 'a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite and has not yet been adhibited in an authentic shape'".

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This is the situation where the parties stand upon nothing but an engagement which is not final or complete But where actings and conduct of parties are founded on, then in all such cases, to use language of Professor Bell in his Principles, S. 26, "*rei interventus* raises a personal exception, which excludes the plea of *locus penitentiæ*. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocably referable to the contract and productive of alteration of circumstances, loss or inconvenience, though not irretrievable." Then they say that there is nothing in the law of India inconsistent with it but that upon the contrary, the law of India follows the same rule. They further quote with approval the statement of Lord Selborne in *Maddison* v. *Alderson* [1]. that the defendant in such a case really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded injustice of a kind which the statute could not be thought to have had in contemplation would follow. It seems to me the reasoning would apply with all the greater force to the present case where it is the plaintiffs that are faced with equities resulting from the acts done by the defendants not merely on the faith of the contract, but also on the basis of further acts of the plaintiffs purporting to be done in perfecting the contract. It is observed by the Board that "many authorities are cited in support of these propositions from English and Scotch Law and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon."

1. (1888) L. R. 8 A. C. 467.

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In my opinion the proposition laid down in such clear and emphatic language entirely covers this case. Their Lordships were of course aware that in India there was no Statute of Frauds and the statute to which their observations were most applicable was the Transfer of Property Act. In a more recent appeal from the decision of this Court *Venkayyamma Rao* v. *Appa Rao* [1], their Lordships took occasion to repeat that equitable principle enunciated by Lord Selborne in *Maddison* v. *Alderson* [2], was as pointed out by them in *Mahomed Musa* v. *Aghore Kumar Ganguli* [3], as much applicable in India as in England. That was a suit to recover possession of land on the strength of a contract and the propositions which have been referred to above were cited in order to show that even if the acceptance of the proposal to convey the village in dispute might be considered to be defective, the defect must be taken to have been cured in view of the actings of the plaintiff. The case affords another illustration of the principle 'that equities may support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon.'

In an earlier case *Immudipattam Thirugnana Kondama Naick* v. *Periya Doraisami* [4], the Privy Council had expressed the same view in a case in which the provisions of the Transfer of Property Act made the mortgage in question in that suit invalid as not being made by a registered instrument. There it was contended that though the mortgage might fall short of an actual transfer, it showed a good contract for one and that the defendant might now call upon the heir of the mortgagor to implement that contract. Their Lordships said that if such a contract were proved, it would have been an answer to the plaintiff's claim and the exact form in which it could be enforced was not material. As pointed out by the learned Chief Justice, if the defendant in that case had sought to enforce the alleged contract by a suit he would have been time-barred. Here, there can be little doubt that there was a valid contract for transfer of the land in dispute by way of exchange and it seems to me that *Immudipattam Thirugnana Kondama Naick* v. *Periya Dorasami* [4] is authority for the proposition that it is a sufficient answer to the plaintiffs' suit. No doubt the observation of the Judicial Com-

1. (1916) I. L. R. 39 M. 509.
2. (1883) L. R. 8 A. C. 467.
3. (1914) I. L R. 42 C. 801.
4. (1900) I. L R. 24 M. 377.

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mittee in *Immudipattam Thirugnana Kondama Naick* v. *Periya Dorasami* [1] was considered by the Full Bench in *Kurri Veerareddi* v. *Kurri Bapareddi* [2] and put aside as an *obiter*. But now that the principle on which the dictum of the Privy Council was based has been so clearly explained and developed in *Mahomed Musa* v. *Aghore Kumar Ganguli* [3] and *Venkayyamma Rao* v. *Appa Rao* [4] we should no longer be justified in disregarding the principle itself because embodied in a statement not necessary for the decision of the case.

Another group of cases in which the operation of equity founded on the conduct of parties is exemplified is represented by *Gregory* v. *Mighell* [5] the rule of which is explained by Lord Kingsdown in the leading case of *Ramsden* v. *Dyson* [6] in these words: "If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord that he shall have a certain interest, takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectation with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory* v. *Mighell* [5] and as I conceive, is open to no doubt." Other well-known cases illustrative of the same doctrine are *Plimmer* v. *Mayor of Wellington* [7] and *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool) Limited* [8], where an irrevocable license from the Crown to erect jetties and buildings on the foreshore was presumed. The Judicial Committee while adverting in the latter case to the remark of Willes, J. in *Rogers* v. *Brooks and wife* [9], that after so long a possession (*i. e.*, of 36 years) he would presume anything in favour of the plaintiff and to the comment thereon of Lord Herschell observes, "in the opinion of the Board this passage does not support the proposition that a transfer of the dominium of lands can be effected with the presumption of a lost grant, or without possession during the full requisite period of prescription. But

1. (1900) I. L. R. 24 Mad. 377.
2. (1904) I. L. R. 29 Mad. 336.
3. (1914) I. L. R. 42 Cal. 801.
4. (1916) I. L. R. 39 Mad. 509.
5. (1811) 18. Ves. 328.: 34 E. R. 341.
6. (1866) L. R. 1 H. L. 129.
7. (1884) 9 A. C. 699, 710.
8. (1915) A. C. 599.
9. (1783) 1 T. R. 431, n=99 E. R. at p. 1179.

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the case does bear upon a question of maintenance of possession considered apart from declaration of ownership." The italics are mine. It is worthy of note that the facts of the case in 2 Eq. C. 522 referred to by the Chief Justice and which was cited with approval by Kay, J. in *McManus* v. *Cooke* [1], as laying down that if a man builds a house partly on his neighbour's land and the neighbour acquiesces in, this being done Courts of Equity will interfere to prevent him from disturbing it, very closely resemble the facts of the present case.

Rulings of the above categories which are really illustrations of the same principle on which the doctrine of part performance is found are based on grounds of acquiescence and Fry, J. in *Willmot* v. *Barber* [2] expressed the limitations of this rule in these words: "In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land, on the faith of his mistaken belief. Thirdly, the defendant the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgment nothing short of this will do."

The third condition mentioned in the above proposition must however be understood as subject to exceptions as Mr. Justice Story states in his Equity Jurisprudence, Second English Edition, S. 387 "there are indeed, cases where even ignorance of title will not excuse a party: for, if he actually misleads the purchaser by his own representations, although innocently, the maxim is probably

1. (1887) 35 Ch. D. 681. 2. (1880) 15 Ch. D. 96 at p. 105.

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applied to him, that, where one of the two innocent persons must suffer, he shall suffer who, by his own acts occasioned the confidence and the loss. That is also the effect of S. 115 of the Evidence Act as interpreted by the Judicial Committee in *Sarat Chunder Dey* v. *Gopal Chunder Laha* 1. The existence of estoppel does not depend on the motive or the knowledge of the matter on the part of the person making the representation. It is not essential that the intention of the person whose declaration, act or omission has induced another to act or to abstain from acting should have been fraudulent or that he shall not have been under a mistake or mis-apprehension.

No doubt as observed by Lord Selbourne, the doctrine of estoppel by representation is applicable only to representation as to some state of facts alleged to be at the time actually in existence and not to promises *de futuro* which if binding at all must be binding as contracts. But representation as to the legal act of a party being valid as was the case in *Sarat Chunder Dey* v. *Gopal Chunder Laha* 1, is within the meaning of S. 115 of the Evidence Act and in the present case the conduct of the appellants in obtaining from the respondents Rs. 525 on account of this land while construction of the building was in progress amounted to a representation that the transaction of exchange was valid and the respondents were actively encouraged thereby to go on spending money on the faith of the representation. This at least is sufficient to estop the appellants from contending that the title did not pass to the respondents even if no estoppel arose from what had happened previously.

The recognition of equities arising from the conduct of parties is not confined to transactions with respect to land as held by Kay, J, in *McManus* v. *Cooke* 2 and as will also be seen from *In re Wilson* 3, and the cases cited there by Horridge, J. In *In re Wilson* 3, the question was as to the effect of actings on a deed of arrangement admittedly void for want of registration and an observation of Honyman, J. which had the approval of Lord Esher, M. R. is quoted: "A man cannot say at one time that the transaction is valid and thereby obtain the advantage to which he could only be entitled on the footing that it is valid and at another time say it is void for the purpose of securing some

1. (1892) I. L. R 20 Cal. 296. 2 (1887) 35 Ch. D. 681.
3. (1916) 1 K. B. 382

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further advantage." Horridge, J. on the authority of that and other cases held that the appellant could not rely upon the invalidity of the deed of arrangement observing "The view that I have taken does not make the registration of the deed good but prevents the appellant from relying on its invalidity."

The Indian cases before *Kurri Veerareddi* v. *Kurri Bapireddi* [1], as reviewed there, show a conflict of decisions and it is unnecessary to discuss them again. The ruling in the Full Bench case has been followed in *Narasimha Raju* v. *Raghunadha Raju* [2]. In *Thiruvenkatachariar* v. *Seshadri Aiyangar* [3], however, the Chief Justice and Srinivasa Aiyangar, JJ., held that it did not apply to a suit in which the defendant was sought to be ejected by the plaintiffs who had bought the land from the owner by a registered sale-deed but with notice of a prior contract of sale in favour of the defendants, on the ground that the latter obtained a registered conveyance afterwards. In neither of these cases, however, the effect of the pronouncements of the Judicial Committee was taken into consideration.

The only case brought to our notice in which it was considered is *Khagendra Nath Chatterjee* v. *Sonathan Guha* [4] and there the learned Judges expressed their dissent from *Kurri Veerareddi* v. *Kurri Bapireddi* [1] and gave effect to equitable considerations arising from the conduct and actings of parties in the light of the propositions laid down by the Judicial Committee.

Agreeing with the learned Chief Justice, I would dismiss the appeal with costs.

As my learned brothers Sadasiva Aiyar and Napier JJ. have taken a different view of the case, the order shall be as proposed by them.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J. :—I had the great advantage, before I began to write this judgment of a perusal of the opinion which my brother, Napier, J. has prepared in this case and which he is about to deliver.

I agree with that judgment except on one or two very minor points which will be mentioned in the course of the following judgment of my own.

The estoppel in *Ramsden* v. *Dyson* [5] and *MacManus* v. *Cooke* [6] is based on what is called 'a duty' on A the owner of a land to

1. (1909) I. L. R 29 M. 336.
2. (1915) M. W. N. 819.
3. (1916) 30 M. L. J. 569.
4. (1915) 20 C. W. N. 149.
5. (1866) L. R. 1 H. L. 129.
6. (1887) 35 Ch. D. 681.

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actively assert his title to that land and set up his adverse title when he sees B building upon his land, when B was supposing by mistake that he (B) was the owner of the land and not A., I am myself (with the greatest respect) inclined to doubt very much whether there is any such legal duty upon A's part to actively correct the mistake made by B. Especially where B's mistake was a very foolish and reckless mistake, why should not B suffer for it? However, as my learned brother has pointed out, there is nothing to show in the present case that the plaintiff knew his own subsisting title to the site when the building in question was being raised by the defendant. In *Russell* v. *Watts* [1], Cotton, L. J. speaks of A letting B "run into a trap" by A's failure in his duty to undeceive B.

The learned Lord Justice was evidently not satisfied that the mere doctrine of estoppel by omission was sufficient to support the decisions and attempts to press into service the doctrine of 'laying traps' which had been till then utilised only as a part of the law of torts. That doctrine of 'trap' seems to have been once pushed too far in English Courts (see Crompton, J's dictum in an old case of *Gallagher* v. *Humphrey* [2]) and I do not feel inclined to introduce all the refinements and uncertainties found in the subsequent English Case Law on this point into India. Under that doctrine, trespassers were sometimes converted into licensees, invitations to trespass by good-natured negligent owners of land were implied on most slender grounds and a man was made civilly liable in damages to trespassers because he was too indolent to fence his lands not even closely bordering on a highway. In short, moral and social duties were sought to be converted into legal duties. The rather too wide language (if I may say so with respect) used by some of the Law Lords in *Cooke* v. *Midland Great Western Railway of Ireland* [3] was sometimes sought to be availed of for even extending the doctrine. In that case, however, there was a statutory duty cast upon the Railway Company to fence their land and to keep the fencing in proper repair: and we also know that Railway Companies guilty of negligence are treated much less indulgently in England than in India. In the more recent case of *Latham* v. *Johnson* [4] this doctrine of trap has been, however, now confined within strict limits. Because some English decisions have

1. (1883) 25 Ch. D. 559.
2. (1862) 10 W. R. 664.
3. L. R. (1909) A. C. 229.
4. L. R. (1913) 1 K. B. 398.

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established a legal duty on the negligent owner of the land for not looking after it and not preventing the public from trespassing upon it, I am not inclined to hold that Indian Courts ought to create a legal duty in A the owner of a land to actively take the trouble to warn a reckless person, B, who chooses to build in A's land and to impose upon A the disability of losing his right to recover the possession of his land from a trespasser, because he did not give the warning to B.

As regards the cases like *Plimmer* v. *The Mayor of Wellington* [1] and the *Attorney General of Southern Nigeria* v. *Jhon Holt and Company* [2], these are not cases where B who built on A's land was ignorant of A's right. He knew it full well and yet built upon A's land believing that A was assenting to such building and would give him (B) a perpetual lease-right (or other similar right), A having conducted himself in such a manner as to induce B to entertain a reasonable belief that A assented to the building. These cases also do not apply to the facts of the preseat case, as the defendants did not believe that the plaintiffs continued to be the owners of the plaint site or that the defendants could build only with the plaintiffs' implied or express consent and had no power to build without such consent.

He did not care for or expect plaintiffs' consent at all. The plaintiffs' conduct in not objecting had nothing to do with the defendants' activities in the building operations and the defendants did not expect from any such conduct that the plaintiffs as the *then* owners were going to give the defendants license to build with permanent rights over the site and the building.

I am also of opinion that S. 51 of the Transfer of Property Act indicates that the person B believing in good faith that he is absolutely entitled to property and building on it, cannot be allowed to claim larger rights than are mentioned in that section, namely, either to have the value of the improvements made by him estimated and paid by A (the evictor) or to require the evictor A to sell his interests in the property at the then market value irrespective of the building. I agree with Seshagiri Aiyar, J. that the option is with A, the person entitled to evict, in this case the plaintiffs. I think the word 'transferee' in S. 51 includes also a transferee under an invalid transaction of

1. (1884) L. R. 9 A. C. 699. 2. L. R. (1915) A. C. 599.

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transfer and the words "the person causing the eviction" include also the transferor under an invalid transaction of transfer.

As regards the Privy Council decision in *Venkayamma Rao* v. *Appa Rao* [1], I am clear that the language of their Lordships at page 148 clearly implies that their Lordships were aware that the decree should be strictly (*a*) for execution of a conveyance in plaintiff's favour *and* (*b*) for possession of the plaint lands, these being the two reliefs ordinarily claimed and decreed in a successful suit for specific performance of a contract of sale, but their Lordships thought that as a Receiver had been appointed in the suit and such Receiver (as an officer of the Court) would act upon their Lordship's judgment (as he was bound to do) without the necessity of the plaintiffs applying for execution of the decree the shape of their Lordships' decree need not include a direction for the execution of a conveyance and that the decree for delivery of possession alone "in the terms of the contract affirmed" as valid by the Privy Council would be sufficient to give the plaintiff full relief especially in view of the declaration of the plaintiff's title as owner and her being given possession through the officer of the Court. I am unable however to agree with the contention of the learned Advocate-General (and I regret that on this point I differ from my learned brother, Napier, J.) that the contract relied on by the plaintiff in the above Privy Council case is not a contract to convey, falling under S. 54 of the Transfer of Property Act but is governed by S. 9 of that Act.

I would allow the appeal and pass an order for return of a finding on the issue in terms of the last paragraph of the judgment of Seshagiri Aiyar, J. The parties will bear their respective costs throughout. Three months for return of finding and ten days for objections.

Napier, J.

Napier, J.:—The question raised in this appeal is, whether in the circumstances, the defendant is entitled to resist the suit brought by the plaintiff to recover possession of land which, he, the defendant received from the plaintiffs in exchange for other land, the exchange not having been made in accordance with the provisions of S. 118 of the Transfer of Property Act. The first ground on which the claim is resistel is that of estoppel. Mr. T. R. Venkatarama Sastri relies on the fact that one year after the

1. (1916) 20 M. L. T. 187=31 M L J 58=39 Mad. 509.

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exchange purported to have been made and the parties took possession of the respective plots, the plaintiff claimed a sum of money by way of compensation for the difference in size of the two plots and that he received it knowing at the time that the defendant was building on the land. He has strenuously urged that this receipt of the money intentionally caused the defendant to believe that the property was his. I am however unable to see how this argument arises on the facts. The money was claimed and received by the plaintiff in the full belief that he had no longer any title to the land which he had parted with and in compensation for deficiency in area. It had nothing to do with the fact that the defendant was building and would have been claimed by him whether the defendant built or not. It represented nothing more than the full completion of the contract to change. It is impossible to argue that the facts of this case can be brought within the doctrine of estoppel as laid down in the well known case of *Wilmot* v. *Barber* [1] where the requirements for estoppel by representation under English law are set out and it has been expressly held by the Privy Council that S. 115 of the Indian Evidence Act reproduces the English law on this point. It is however argued that there is a doctrine of equitable estoppel which is more favourable to persons in the position of this defendant. This doctrine is referred to by Lord Justice Bowen in *Proctor* v. *Bennis* [2] as the equitable doctrine of acquiescence, authority for which is to be found in the case of *Ramsden* v. *Dyson* [3]. It is important to ascertain exactly the limits of this doctrine as it has been expressly applied to this country by the Privy Council in *Beni Ram* v. *Kundan Lal* [4]. I gather from the language used by the learned Chief Justice in this case under Appeal that he relies on *Ramsden* v. *Dyson* [3], and a later case *MacManus* v. *Cooke* [5]. The doctrine in *Ramsden* v. *Dyson* [3] is as follows :—

"If a stranger begins to build on my land supposing it to be his own, and I perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money". "It considers, that when I saw the mistake into which he had fallen, it was in my duty to be active

1. (1880) 15 Ch. D 96 at p. 105
2. (1887) 36 Ch. D. 740.
3. (1866) L. R. 1 H. L. 129
4. (1899) I. L. R. 21 All. 496.
5. (1887) 35 Ch. D. 681.

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and to state my adverse title". It is however clearly stated in a later passage that to raise the equity the real owner should at the time know that the land belongs to him (vide page 141). This condition is insisted on, in *Proctor* v. *Bennis*[1] where Cotton, L. J. says that "the party who has suffered, should have been acting in ignorance of the title of the other man and that the other man should have known that ignorance and not mentioned his own title," and Bowen, L. J. says, "in order to make out such acquiescence it is necessary for them to establish that the plaintiff stood by and knowingly allowed the defendant to proceed and to expend money in ignorance of the fact that he, that is, the person setting up his claim, had rights and meant to assert such rights." In an earlier case, *Russell* v. *Watts* [2] the same learned Lord Justice Cotton, L. J. states as follows:—"The knowledge by A of B's mistake imposes on A the duty to undeceive him, if he knows facts which are unknown to the other persons and does not inform them about it but lies by and lets them run into a trap." The whole subject is considered in White and Tudor's Leading Cases in Equity under the heading "Equitable Estoppel" where a large number of cases are collected and the proposition is thus stated by the learned editor from the language of the Court of Appeal in a case in 8 Chancery Division 314:—"If a person having a right and seeing another committing an act infringing upon that right stands by in such a manner as really to induce the person committing the act to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act." The proposition put in this form seems rather to narrow the doctrine as enunciated in some of the cases; but it is clear that the essence of the doctrine of estoppel by acquiescence is that the acquiescence should occur in a party *who knows that his right is being infringed.* It may be that this goes a little beyond the doctrine laid down in *Willmot* v. *Barber,* [3] where estoppel requires that the possessor of the legal right must have *encouraged* the plaintiff in his expenditure of the money and it is possible that it also goes beyond the doctrine as stated in S. 115 of the Evidence Act; but whether this be so or not, it is clear that the facts of this case do not come within the doctrine, for there is no evidence that at the time the defendant was expending his money, the plaintiff knew

1. (1887) 36 Ch. D. 740. 2. (1883) 25 Ch. D. 559.
3. (1880) 15 Ch. D. 96.

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that the exchange was bad in law by reason of the want of registration. With the greatest deference therefore to the learned Chief Justice, I cannot think that this defence can prevail.

The next point argued by Mr. T. R. Venkatrama Sastry was that a license by the plaintiff to the defendant must be implied and reliance is placed on two cases, *Plimmer* v. *The Mayor of Wellington* [1] and *Attorney-General of Southern Nigeria* v. *John Holt and Company* [2]; but in both those cases the Crown being naturally the owner of the foreshore knew that the land on which the other parties were building was the property of the Crown and the cases come within the doctrine above stated. It is impossible to say that a person can give another, license to build on his land when he does not know that the land belongs to him.

The next point taken for the respondents is that there having been part performance of the exchange, the law will treat it as complete although admittedly there is no valid exchange under the Transfer of Property Act. The authorities relied on for this proposition are two recent cases in the Privy Council *Mahomed Musa* v. *Aghore Kumar Ganguli* [3] and *Venkayamma Rao* v. *Appa Rao* [4]. Before examining these cases it is advisable to understand how the law has been regarded in this country.

The language of the Transfer of Property Act admits of no misconstruction. S. 54—" Sale is a transfer of ownership," etc. " Such transfer in the case of tangible immoveable property of the value of Rs. 100 can be made only by a registered instrument." In the case of tangible immoveable property of a value less than Rs. 100 such transfer may be made either by a registered instrument or by delivery of the property." It has definitely been laid down by a Full Bench of this Court that the words " can be made only" make it impossible for any person to acquire title to property of that description by transfer "*inter partes*" otherwise than by a registered instrument. *Vide Kurri Veerareddi* v. *Kurri Bapireddi* [5] where the whole question was exhaustively considered. The learned Chief Justice points out how important it is from the point of view of public policy to maintain the requirements of registration and how dangerous it is to allow cases of hardship to affect these requirements and thus induce a system of uncertainty

1. (1884) L. R. 9 A. C. 699
2. L. R. (1915) A. C. 599.
3. (1914) I. L. R. 42 C. 801=28 M. L. J. 548.
4. (1916) I. L. R. 39 M. 509
5. (1904) I. L. R. 29 M. 336.

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and give opportunities for claims to be founded on perjured evidence. Subramania Aiyar, J. quotes some very strong observations by the House of Lords on the danger of modifying imperative statutory provisions on the ground of equity from *Young and Co.* v. *Mayor and Corporation of Royal Leamington Spa*[1] from which I extract the following:—"It is however. for the legislature to determine whether the benefits derived by enforcing a general rule are or are not too dearly purchased by occasional hardships. A Court of Law has only to inquire what has the legislature thought fit to enact." Bearing in mind that it has been the effort of the legislature of this country to codify the law so as to make it easily applicable by Judges of inferior courts not so highly trained as those in Courts in England, I have no doubt that this is the true principle to apply in ascertaining the law of this country. We have not here as there has been in England an equity jurisdiction that has grown up side by side with the common law of the country, and I think that we should refrain from engrafting equitable doctrines on the plain words of our Codes. This is the view that I have expressed in other cases and it is founded on decisions of their Lordships of the Privy Council in several cases. But it is said that we have no alternative since the two decisions above referred to. Before dealing with the observations of the Board relied on, it is advisable to ascertain exactly what was decided in each case. In *Mahomed Musa* v. *Aghore Kumar Ganguli* [2], the suit was to redeem two mortgages, dated the 22nd July 1848 and the 4th April 1871. The defendants pleaded that in 1873 a suit to enforce the latter agreement was brought by the mortgagee and settled by a compromise under which the mortgage debts were to be paid off and the property to be divided into specific shares, the mortgagor to convey those shares to the parties respectively entitled, and that a decree was made by the Court that the suit be decided in pursuance of the terms of the compromise and be struck off from the list. No conveyance was executed by the mortgagor nor was the agreement registered; but it was acted upon and carried out by all the parties and their successors in title up to the date of the suit as if the conveyance has in fact been made. The High Court of Calcutta held that the mortgages of 1848 and 1871 were extinguished by the compromise and that therefore the right to redeem was lost. The Privy Council accepting the view of the

1. (1883) L. R. 8 A. C. 517. 2. (1914) I. L. R. 42 C. 801.

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facts taken by the learned Judges "concurred with the legal result arrived at." That is the actual decision. Their Lordships say on page 815, "the point which is made against giving effect to this compromise is that a conveyance was not made. This is true: but no written conveyance by law of India was at the date of that transaction necessary, the Transfer of Property Act not having been passed until the year 1882." The judgment of the High Court is not reported, but it is clear from the arguments that the Court relied on the fact that at the date of the compromise agreement, registration of such an agreement was optional under S. 18 of the Registration Act IX of 1871 and held that oral evidence was admissible to prove that the equity of redemption was released by the mortgagor. It cannot be argued that the actual decision in the case is any authority for the proposition that the requirements of the Transfer of Property Act can be ignored: but it is suggested that the *obiter dicta* of the Board carry the case a great deal further. Dealing with these *dicta* with the very greatest respect as I am bound to do, I think it proper to apply the rule laid down by Lord Halsbury in *Quinn* v. *Leathem* [1] in discussing the decision in *Allen* v. *Flood* [2]. "There are two observations of a general character which I wish to make and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved since the generality of the expressions which may be found there, are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found." Applying this principle of construction of judgments, I feel myself entitled to say that general expressions as to the effect of equity or statutory requirements must be confined to the statute under consideration, and secondly, that where, as in that case no statutory requirement was violated, general expressions of the effect of equity on the acts of the parties are no authority for ignoring statutory requirements. That the acts of the parties or their intended acts were alone under consideration is clear from the language used on page 150, "but even if a transfer in writing had from a conveyancing point of view been omitted or if some other formal defect had occurred, their Lordships are of opinon that this would have been unavailing to the appellants in the attempt made in the present suit to redeem

1. (1901) L. R. A. C. 495. 2. (1893) A. C 1.

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the mortgages, for the points against opening up the transactions are manifold and in their Lordships' opinion conclusive." The compromise has been acted upon by all the parties to it and by their successors in title "from that date to this." It is to my mind perfectly clear that their Lordships are here referring to the failure by the mortgagor to execute a conveyance in accordance with this agreement and not with any reference to statutory requirement of a conveyance which as their Lordships have pointed out in the previous sentence did not at that time exist. It is with reference to this state of affairs that their Lordships apply the case of *Maddison* v. *Alderson* [1] and the language of Professor Bell in his Principles, Section 26, and therefore when their Lordships in the next words say that "they do not think there is anything in the law of India inconsistent with it but that on the contrary these laws follow the same rule" this *dictum* has reference to the effect of long continued acts of parties in rendering unnecessary a conveyance which was required by the terms of the agreement, and not to the effect of such acts on statutory requirements. I will now deal with *Venkayyamma Rao* v. *Appa Rao* [2]. The facts are as follows:— The suit was brought by a lady for a declaration that she was entitled to a certain village for possession. She based her case on an alleged contract with the last holder and on a subsequent oral bequest to her. The District Judge held that the village had been purchased under the alleged contract and had been held in trust for the appellant. He also upheld the oral devise. The High Court found neither contract nor devise proved and dismissed the suit (except against a party who had not appealed). Before the Privy Council it was contended that there was a valid contract which could be enforced by specific performance. It was *not* contended that anything had occurred which operated as a transfer. The contract as found by the Board was as follows: The deceased lady had induced the plaintiff, her niece, to live with her by promises of a general character and had actually conveyed to her two small properties which she purchased. In 1893 she purchased the suit village. She made no concealment that she had done it for the plaintiff but she refused permission for the title being taken in the plaintiff's name. A quarrel arose and the plaintiff and her husband left the deceased. Then the deceased wrote a

1. (1883) L. R. 8 A. C. 467. 2. (1916) I. L. R. 39 M. 509.

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letter which the Privy Council held to be a promise. By the letter she undertook to convey the property to the plaintiff on her death. The plaintiff returned to live with the deceased and their Lordships held that constituted acceptance of the promise and consideration for a good contract (*vide* page 144). Having found the contract their Lordships say that the citation of *Maddison* v. *Alderson* [1] and *Maunsell* v. *Hedges* [2] is beside the mark. "The true issue is a contract proved? Had a contract been proved in either of the examples cited there is nothing to suggest that the law would have refused to give effect to it *by way of specific performance.*" Their Lordships then go on to consider the facts on a narrower basis. "Suppose the proof of acceptance *in terms* by the Rani was considered to be defective what is the situation in view of the actings of the plaintiff" and continue "their acting took place on the footing of a proposal so made and were known by Papamma to have taken place on that footing. In these circumstances the objection that the contract was inchoate or incomplete cannot be maintained." For this proposition their Lordships referred to *Maddison* v. *Alderson* [1] and the case in *Mahomed Musa* v. *Aghore Kumar Ganguli* [3] and say that the power of resiling is barred by the *rei interventus* excluding the plea of *locus penetentiae*, and once more their Lordships say that there is nothing in the law of India inconsistent with it. With great respect to my learned brother who takes a different view, I am at a loss to understand what bearing this latter observation has on the supposed efficacy of part performance to effect a transfer of immoveable property contrary to the Transfer of Property Act. If any Act is referred to, it can only be the Contract Act or the Specific Relief Act for the existence of a valid and enforceable contract was the sole question under consideration, and if I may say so with respect, neither do I know anything in either Act which would prevent a Court finding a contract proved in the circumstances suggested by their Lordships. Neither the decision nor the dicta, nor indeed the argument of counsel had anything whatever to do with part performance operating as transfer. An argument is however founded on the form of the decree in that case, it being a direction to the Receiver to put the plaintiff in possession. Their Lordships say that the fact there is a receiver saves any complexity in carrying out the judgment. The plaintiff had, on the footing of a contract

1. (1883) L. R. 8 A. C. 467. 2. (1854) 4 H. L. C. 1039=10 E. R. 769.
3. (1914) I. L. R. 42 Cal. 801.

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and an oral devise, asked for a *declaration of title* and possession. Undoubtedly, if the oral devise was proved, there would have been a valid transfer and the decree asked for would have been proper. Counsel before the Privy Council however based his case on contract only and asked for *specific performance.* The Privy Council found the contract proved and did not deal with the devise, so, naturally did not give a declaration of title. The only question is why did not the Board put its decree for *specific performance* in the form of a direction to the Receiver to convey ? The report is silent on this matter but I am inclined to think that the suggestion of the learned Advocate-General is the true explanation. He points out that the transaction is not a sale because there was no price, and not a gift because there was consideration, and clearly not an exchange; so none of Ss. 54, 123 or 118 of the Transfer of Property Act applies with the result that S. 9 applies and the transfer can be made without writing. The simplest form of transfer is by putting a person in possession. Vide S. 54 of the Transfer of Property Act. No registered instrument was necessary and it follows therefore that the form of the decree in this case does not give any assistance to the doctrines sought to be established. I would like also to point out that the application of the doctrine of part performance in England, and the use sought to be made of it in this case are not in *pari materia.* In England it belongs to the sphere of contract and operates, where applicable, to allow a party to prove a contract in an action in spite of a statutory prohibition. Here there is no contract part performed. The contract is executed. What is sought is to make total performance of an executed contract operate to create legal rights in violation of a statute. Even if there had only been part performance by one party there would have been no statutory difficulty in getting a decree for specific performance for there is no statutory provision in the Transfer of Property Act or the Contract Act requiring the contract to be proved by writing. There is therefore no room for the application of the English doctrine of part-performance in this country. What the respondents are really seeking to do is to apply another entirely different equitable rule inherited from the Courts of Chancery, "Equity will treat that as done which ought to be done" and to apply it against the statute. For the above reasons, I am clear that nothing in either of the two cases relied on has any bearing on the point and that the authority

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of the decision of the Full Bench in *Kurri Veerareddi* v. *Kurri Bapireddi* [1], remains unshaken. I would add that apart from principle and authority I should find great difficulty in accepting the statute where it indicates that placing in possession will not be a valid transfer, and ignoring it where it uses the definite words "a transfer of ownership can be made only by a registered instrument." We are next asked to make a decree for specific performance. I have the greatest difficulty in seeing how such a decree can be given to a defendant (*vide* observations of Subramania Aiyar, J. in *Kurri Veerareddi* v. *Kurri Bapireddi* [1]) and I am clear that we cannot do it in this case when the defendant did not ask for it in his written statement, and no issue was settled on the point. I therefore express no opinion on the questions whether Exhibit B can be used to prove an agreement for what agreement would be proved by it. The sole question that remains is whether the defendant is entitled to the benefit of S. 51 of the Transfer of Property Act or the principle underlying it. In my opinion a wide meaning must be given to the word "transferee" in this section and it should read as including a person to whom land purported to be transferred. The provision in the Mesne Profits and Improvements Act XI of 1855, which is still in force in India where English law is applicable is "If any person shall erect any building etc., upon any lands held by him *bona fide* in the belief that he had an estate in fee-simple etc., "and such person be evicted by any person having a better title," and the rest of the section is reproduced in S. 51 of the Transfer of Property Act. It has been held in *Ramalinga* v. *Samiappa* [2], that S. 51 only declared the pre-existing law on the subject and there is no doubt that the Act of 1855 embodied the English law. I would therefore adopt the course suggested by Seshagiri Aiyar, J. and call for a finding on the 4th issue. I agree with Sadasiva Aiyar, J. as to costs.

In compliance with the order contained in the above judgment, the lower court returned a finding that the plaintiffs were liable to pay to the defendants compensation to the extent of Rs. 5,795 on account of the damage that was likely to accrue to the defendants, by the severance of the structure on the site in dispute.

The Court delivered the following

Judgment:—We think that Rs. 3,505 will be a sufficient compensation in the circumstances of the case on the basis on

1. (1904) I. L. R. 29 M. 336. 2. (1889) I. L. R. 13 M. 15.

which the amount is calculated in paragraph 12 of the Subordinate Judge's finding. The decree will be modified accordingly. The mandatory injunction will not be issued until this amount has been deposited in Court. The money will be deposited by the plaintiffs within a fortnight of the re-opening of the Court and the defendants will remove so much of the building as stands on the land of the plaintiffs within two months from the date of the deposit. There will be no order as to costs.

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A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, *Chief Justice* AND MR. JUSTICE BURN.

V. Navaneetha Krishna Thevar ...	*Appellant* in the appeal and petitioner in the petition (23rd Defendant)*
v.	
Ramasami Pandia Thalavar and others.	*Respondents in both the appeal and the petition. (Plaintiff and Defendants Nos. 1, 3 to 9, 11, 13 to 22 and 27 to 31).*

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Madras Court of Wards Act (I of 1902), S. 35—Court of Wards—Powers of alienation over estate—Ward having only limited right under Hindu Law—Effect—Hindu Law—Widow—Alienation — Conversion of rent payable in kind into money rent—Validity—Reversioner—Suit for declaration of reversionary right—Maintainability—Conditions—Evidence Act, S 35—Copies of actual letters made in registers of official correspondence kept for reference and record—Admissibility—Probative value of.

The power to sell, mortgage or lease given to the Court of Wards by S. 35 of the Court of Wards Act is in terms absolute and is not governed by the restriction in the later part of the section. The Court of Wards superintending the estate of a ward under the Act is not, as regards its powers of alienation over the estate, subject to the same restrictions to which the ward is under the Hindu Law subject. The word "property under its superintendence" in S. 35 means the moveable and immoveable property itself and not the particular interest of the ward as widow.

Where the Court of Wards entered into compromises by which on payment of rents reserved the tenants were allowed permanent rights of occupancy at fixed rents, *held* that, assuming that the transactions amounted to sales, of the kudivaram or occupancy right, the alienations, were covered by the first part of S. 35 and that in any case they were covered by and were also within the powers conferred by the second part.

The conversion of rents payable in kind into money rents is within the powers of a limited owner such as a widow.

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* A. No. 330 of 1911 and C. M. P. No. 845 of 1915. A. S. No. 381 and 425 of 1914. 24th November, 1916.

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Reversioners are not entitled to sue for a declaration that they are the next reversioners unless the decision of that question is incidental to the grant of some other relief to which they may be entitled.

Janaki Ammal v. *Narayanasami Aiyar* [1], followed.

Copies of actual letters made in registers of official correspondence kept for reference and record are admissible under S. 35 of the Evidence Act as reports and records of acts done by public officers in the course of their official duty and of statements made to them. They are entitled to great consideration in so far as they supply information of material facts and also in so far as they are relevant to the conduct and acts of the parties in relation to the proceedings of Government founded on them.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in Original Suit No. 26 of 1912.

Appeal transferred to the file of the High Court from that of the District Court of Tinnevelly where it was numbered as Appeal Suit No. 477 of 1914 against the decree of the Court of the Subordinate Judge of Tinnevelly in Original Suit No. 63 of 1911 transferred from the file of the Court of the District Munsif of Ambasamudram where it was numbered as O. S. No. 381 of 1909.

T. R. Ramachandra Aiyar, T. R. Venkatarama Sastri and *S. Visvanatha Aiyar* for the Appellant.

The Hon'ble the Advocate General (S. Srinivasa Aiyangar), Nugent Grant, M. D. Devadoss, S. Ramaswami Aiyar and *K. Raja Aiyar* for the Respondents.

The Court delivered the following

Wallis, C. J.

Judgments:—*Wallis, C. J.* :—Appeal No. 380 of 1914 is an appeal from the judgment of the Subordinate Judge of Tinnevelly in Original Suit No. 30 of 1911 a suit brought by Ramasami Pandia Thalavar claiming to be the nearest reversioner of the last Zamindar of Uttumalai to declare that certain alienations made by the Court of Wards during their management of the estate on behalf of the widow of the late Zamindar, Ranee Meenakshi Sundara Nachiar, now an incapacitated proprietor under Madras Act I of 1902, are not binding on the estate. Under that Act, as amended, suits by and against a ward are to be in the name of the ward but the conduct of the suit is with the manager appointed by the Court of Wards acting as guardian *ad litem.* Defendants Nos. 2 to 22 are alienees and persons claiming under them. Defendant No. 23 denies the plaintiff's pedigree and claims to be the next reversioner, and has brought a similar suit (Original Suit No. 26 of 1912) to declare the alienations of the properties mentioned in schedules 5 and 6 of the plaint in Original Suit No. 30 of 1911 invalid. He was added as a party to this suit together

1. (1916) I. L. R. 39 M. 634 (P.C.) 31 M. L. J. 225

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with defendants Nos. 24 to 31 who claim to be remote reversioners and support him. The plaintiff has also brought other suits in the Court of the District Munsif of Ambasamudram (Original Suits Nos. 380 to 382 of 1909) to question an alleged alienation made by the 1st defendant whilst in management in 1901, and these suits have been transferred to the Subordinate Judge's Court of Tinnevelly and tried along with the principal suit (Original Suit No. 30 of 1911) and are now the subject of appeals before us (Appeals Nos. 346 to 351 of 1915). Though this and the connected suits have been brought for a declaration that certain alienations are not binding beyond the life of the 1st defendant, there can be little doubt that the main object of the plaintiffs in the suits was to assert their respective titles as next reversioners to the estate on the death of the 1st defendant. The relationship of the 23rd defendant is admitted, and though the Subordinate Judge found against his reversionary right, it is now admitted that his judgment on that point cannot be supported. The relationship set up by the plaintiff in the present suit is strongly contested both by the Court of Wards on behalf of the 1st defendant and by the 23rd defendant, and was the main question fought in the Court below. The Subordinate Judge has found that the plaintiff's case is true and that he is the son of Gnanapurani Nachiar, the legitimate daughter of the Zamindar who died in 1850 and of his 2nd wife Gomathimuthu Nachiar who according to the plaintiff's case was the daughter of one Maruthappa Thevar and was married by the Zamindar Navaneetha Krishna Maruthappa Thevar as his 2nd wife between the years 1841 and 1845, and that Gnanapurani's mother was not, as contended by the defendants, a dancing girl named Kuppi who was living w the Zamindar as his concubine when she gave birth to Gn rani. He has also held the alienations questioned to be i has given the plaintiff a declaration to that effect. H on the latter point is supported by the 23rd defendants but Mr. Nugent Grant instructed b the Court of Wards who is the guardian *ad li* dant has appealed against this part of the d tended that the alienations cannot be ques that the suit should be dismissed withou the rival reversioners.

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The alienations questioned in the main suit were made by the Court of Wards whilst in superintendence of the estate purporting to act under the statutory powers given them by S. 35 of the Act. In 1899 the old Court of Wards Regulation V of 1802 was amended by the insertion of a general chapter intended to enable the Court to take encumbered estates under its management and clear them from encumbrances, and in 1902 the Regulation was repealed by Madras Act I of 1902 which re-enacted the provisions of the Act of 1899 and introduced other changes. S. 35 of the Act is in the following terms: "The Court may mortgage or sell the whole or any part of any property under its superintendence and may give leases or farms of the whole or any part of such property for such terms as it thinks fit, and may make remissions of rent or other dues, and may generally pass such orders and do such acts not inconsistent with the provisions of this or any other Act for the time being in force as it may judge to be for the advantage of the ward or for the benefit of the property." The Subordinate Judge has held that this only enables the Court to sell or mortgage the particular interest of the ward in the property under superintendence unless there are circumstances which would justify the ward himself if *sui juris* in selling outright. Under the Act, the ward is not necessarily a full owner and may be, as here, a widow, or the owner of an impartible estate with limited powers of alienation under the Madras Impartible Estates Act, 1904, which continued in substance the provisions of the temporary Act passed at the same time as the Court of Wards Act in 1902, or the property may be owned as joint family property by several minors in which case
he senior if of age would only have a limited right of sale. In
paratively few cases under superintendence in this Presidency
the ward if *sui juris* be full owner with power to sell
The power to sell, mortgage or lease is in terms
is not governed by the restriction in the later part
pointed out in *Mohsan Shah* v. *Mahbub Ilahi* [1];
Court cannot sell outright where the ward has
unless there are circumstances which would
self in selling under the Hindu law is to
the words which are not there and to
e exercise of powers which are conferred

7) I. L. R. 29 A. 589.

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upon it as incidental to its right of management for the benefit of the Estate, that is of the ward and those who come after him. The word property under its superintendence means, in my opinion, the moveable and immoveable property itself and not the particular interest of the ward as widow. Further, if the word property be construed as confined to the limited interest of the ward, it will be necessary to look elsewhere for the Court's power to sell and mortgage outright in cases where the Hindu Law allows it. Powers of selling, mortgaging and leasing are often conferred on trustees and others as incidental to powers of management, the proceeds being held by them as part of the estate, and I see no reason why the section should not be construed as conferring such power upon the Court. To enable it to extricate encumbered estates from difficulties, the legislature in other sections has gone the length of enabling it to oust mortgagees in possession from management of the property under mortgage to them and take over the management. Sales or mortgages of life interests are always highly speculative and unsatisfactory transactions, and were not, in my opinion, the transactions which the section was enacted to validate. It seems to me that the intention was to enable the Court of Wards to give a statutory title free from the risk of law suits by subsequent heirs etc., and so to enable it to realise the best price for the estate. The decision by their Lordships of the Judicial Committee in *Muhammad Mumtaz Alikhan* v. *Farhat Alikhan* [1], did not relate to a sale or mortgage but to a transaction which their Lordships held to be a voluntary alienation not warranted by the latter part of the section which was nearly in the same terms as the present section.

As regards the particular alienations in the plaintiff's schedule, that referred to in the sixth schedule was of one of two bungalows possessed by the estate at a watering place called Courtallum. No tenants were to be obtained, it was falling into decay, and the fact that a ruined Zemindar had been allowed to live there by the late Zemindar and had been buried in the compound was against its letting well. I think that the widow herself would have been justified in selling under these circumstances. The property comprised in the 6th schedule is only 1·7 acres. Both these sales were, in my opinion, within the powers of the Court.

1. (1901) I. L R. 23 A. 394.

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The alienations complained of in schedules 1 to 4 were in respect of certain *pannai* lands in which there was admittedly no occupancy right. The tenants who held on leases for fixed terms set up that, in consideration of their having reclaimed the lands, the late Zamindar had promised to grant them permanent leases on favourable terms and that the promise had been confirmed by his widow in September 1891, whilst in charge of the estate on behalf of her minor son. The Court of Wards contested that claim but later on entered into compromises by which on payment of Rs. 160 per kotta of land the tenants were allowed permanent rights of occupancy at a fixed rent. The result was to settle the litigation and to raise money for the satisfaction of the debts incurred during the life of the late Zamindar. The Subordinate Judge is wrong in saying that such debts were binding only if incurred for necessary purposes. The Madras Impartible Estates Act, 1902, did not affect debts already incurred. The estate which has been included in the Impartible Estates Act was presumably impartible, and under the decisions of the Privy Council was alienable by the holder for the time being prior to the passing of the Act of 1902. Assuming that this transaction amounted to sale of the kudiwaram or occupancy right, I think the alienation was covered by the first part of S. 35, and that in any case it was covered by and was also within the powers conferred by the second part. As regards the rates reserved, it is not shown that they were inadequate, regard being had to the premium paid. The other alienations complained of were made by the widow herself and are the subject of the three suits instituted in the District Munsif's Court of Ambasamudram and transferred to the Subordinate Judge's Court of Tinnevelly and tried along with the other suits, and of separate appeals. The complaint is that the 1st defendant granted the tenants permanent leases and converted the waram rents into fixed money rents. The objection that the 1st defendant granted permanent leases is unsustainable, as it is well settled that even before the passing of the Madras Estates Land Act of 1908 there was a presumption in this Presidency that ordinary ryots, such as these, had permanent occupancy rights in the holdings, and it would have been hopeless to contest it. The conversion of rents payable in kind into money rents is, I think, within the powers of a limited owner, such as a widow. In a good year, rents payable in kind may produce more, but in a bad year they may bring in nothing; and as is well known by every

one at all acquainted with the subject there are great difficulties in the way of the due realization of the land-holder's share under the waram system. These and other reasons have induced the legislature now to give either party a right to sue for a commutation of waram into money rents. In the present case, the Subordinate Judge has not found, and it is not shown, that the rate of commutation was unfair, and in these circumstances, I do not think, the plaintiff was justified in coming to court and asking for a declaration as to these items. It is therefore unnecessary to consider the other points raised by Mr. Nugent Grant in this connection.

The result is that the plaintiffs in these suits have not made out their right to declarations that any of the alienations complained of are not binding on the Estate. It is well settled by a long catena of cases ending with the recent decision of the Privy Council in *Janaki Ammal* v. *Narayanasami Aiyar* [1], that the reversioners are not entitled to sue for a declaration that they are the next reversioners unless the decision of that question is incidental to the grant of some other relief to which they may be entitled. It follows that the only course open to us is to allow all the appeals, reverse the decrees of the lower court and dismiss the suits.

As however the case may not stop here, we think it right to allow the petitioners in Civil Miscellaneous Petitions Nos. 845 and 1655 of 1915 and 2996 of 1916 for the admission of certain documents rejected by the Subordinate Judge, namely, (1) the decree of the Zillah Court of Tinnevelly, dated 31st May 1859 in Original Suit No. 4 of 1859, (2) the Takid of the Collector to the Muzumdar on the death of the Rajah in 1850, (3) the reply of the Muzumdar, and (4) the Collector's Takid in 1853 on the complaint of the Zemindar's widow as to the conduct of Maruthappa Thevar who according to the plaintiff's case was the father of Gnanapurani's mother. They will accordingly be marked as Exhibits XXXIV, XXXV, XXXVI and XXXVII respectively and incorporated in the record. The learned Advocate-General did not support the exclusion of the last three on the ground that the copies of correspondence kept in the Collector's and Taluk offices were not signed but contended that they were not admissible under S. 35 of the Indian Evidence Act. We think however that

1 (1916) I. L. R. 39 M. 634=31 M. L. J. 225.

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copies of actual letters made in registers of official correspondence kept for reference and record are admissible under S. 35 as reports and records of acts done by public officers in the course of their official duty and of statements made to them, and that in the words of their Lordships in *Rajah Muttu Ramalinga Setupati* v. *Perianayagam Pillai*, [1] they are entitled to great consideration in so far as they supply information of material facts and also in so far as they are relevant to the conduct and acts of the parties in relation to the proceedings of Government founded upon them. Treating this evidence as admissible, Mr. T. R. Ramachandra Aiyar addressed us a very powerful argument in support of the appeal of the 23rd defendant. Putting aside the direct evidence of the alleged marriage in the forties of the last century as interested and unreliable, he argued, in the first place, that there was no presumption in favour of Gnanapurani's mother having been a legitimate wife rather than a concubine. The Zemindar was an elderly man, had a wife living who had borne him issue and in whom he reposed great confidence and admittedly had one concubine already living in the palace. In these circumstances, he went so far as to contend that the presumption was even the other way. Coming then to the official records of the proceedings of the Court of Wards and its subordinates in the exercise of their official and statutory duties on the death of the Zamindar in 1850 leaving a minor heir, he relied very strongly on the facts that the Muzumdar had proceeded to the palace immediately and made inquiries and that the Collector had also had an interview with the minor heir and the agents of the late Zamindar, and that the Muzumdar had also paid a second visit and made certain further inquiries under the direction of the Collector, and that not hingwas heard of the Zamindar having left any second wife, whereas one of the grounds given by the Muzumdar in his recommendation that the estate should be handed over to the widow was that she was the sole wife of the Zamindar, a statement which was further admissible under S. 32 of the Indian Evidence Act as made by a person having special means of knowledge. In any case, these proceedings, he contended were clear evidence that Gnanapurani's mother did not enjoy the status of a recognised wife at the death of the Zamindar, and he contended that evidence of subsequent treatment relied on by the other side might be explained by the admitted relationship and the Zamindar's affection for his paternal sister and was of no avail

1. (1874) L. R. 1 I. A. 209 at 238.

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as evidence of habit and repute. He also drew our attention to the Collector's order in 1853 excluding Maruthappa who is now alleged to have been the second wife's father from the palace on the complaint of the Zamindar's widow that he was endeavouring to entrap the minor into a marriage with one of his girls, and to the absence of any reference to the relationship now set up such as we should expect to find if Gnanapurani's mother had really been his daughter and the junior widow of the late Zamindar. He also drew our attention to the pleadings of the same date in which the Zamindar's widow was referred to as the heir of the late Zamindar without any reference to a junior widow as evidence of general reputation. He relied further upon the fact that the mother and daughter did not reside in the palace itself but in a thatched outhouse known as the Thottikattu and on the fact that the name now claimed for her is nowhere to be found in the accounts or conveyances prior to the death of the Zamindar in 1891, whereas on the other hand she is referred to, never in her own name but as the Thottikattu Nachiar or Thottikattu lady years after she had left the palace after her daughter's marriage and gone to live with her in the residence provided by the Zamindar at Uttumalai.

He also relied on the fact that when the Zamindar purchased a village for Gnanapurani in 1885, the sale deed in her name contains no reference to her relationship and does not even accord her the designation of Nachiar. On the other hand, the learned Advocate General on the other side has contended that the very fact that the other widow allowed Gnanapurani's mother to go on living in the palace after the Zemindar's death is strong evidence of habit and repute as, if she had not been his lawful wife, she would have been turned out with her child. There is in my opinion no ground for this suggestion, and I think he was on stronger ground when relying on the subsequent treatment of the daughter, her marriage to a junior member of the Kadambur Zamindar's family, the provision made for her and subsequently for her family who were married into respectable families, and above all, on the correspondence in which Gnanapurani was addressed by the Zemindar as 'sister,' and her mother was addressed as 'mother' and 'my own mother', and the Zemindar's wife referred to the present first defendant as 'your daughter-in-law.' As regards Gnanapurani's marriage, Mr. T.R. Ramachandra Aiyar contended that her husband had been induced to marry her in consideration of the material

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advantages of the connection. He was unable to provide her with a home and he and his family lived in the Zemindar's palace at Uttumalai and in dependence on him. If Gnanapurani had been legitimate, the Zamindar would have found a husband in a position to take her to his own home and support her as happened in the case of the Zemindar's two sisters who died young without leaving issue. The illegitimacy would have been no obstacle to the marriage of her children into good families in this caste of Sudras as appeared from the case *Pandaiya Telaver* v. *Puli Telaver* [1]. He also commented on the fact that there had never been any separate provision made for the mother as the junior widow of the Zamindar, and went into the accounts with a view of showing that the treatment of Gnanapurani and her mother and family, and the provision made for the marriages in her family were not such as were to be excepted if the plaintiff's case was true. With regard to the provision made for Gnanapurani herself and her family, I may say that I was not satisfied that there was any inadequacy on which an inference against plaintiff could be based. As regards the fact that the Zamindar had addressed Gnanapurani as his sister and her husband as his brother-in-law, Mr. T. R. Ramachandra Aiyar contended that under the Hindu Law she was his sister, and that in addressing other relations, the Zamindar had ignored the bar of illegitimacy. His letters to the mother were more difficult to get over. And all that can be urged apparently is that they were all written in the closing years of the Zamindar's life when he had no near relations except Gnanapurani and her family and was disposed to treat her family in all respects as his own. Both parties referred to the oral evidence, but these were the considerations chiefly relied on. I express no opinion as to the proper conclusion to be drawn from them with the assistance of the oral evidence in so far as it may be considered reliable and of all the other evidence in the case; but in the circumstances I have thought it better to mention the course of the argument before us, more especially as it proceeded upon some evidence which was excluded by the Subordinate Judge, and raised considerations very inadequately dealt with by him which will have to be taken into account in deciding whether the evidence on record of habit and repute taken as a whole justifies the presumption of a lawful

1. (1868) 1 M. H. C. R. 478.

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marriage, if it be considered that the direct evidence of marriage cannot be acted upon.

The result will be that Mr. Nugent Grant's Appeals Nos. 428 of 1914 and 346 to 348 of 1915 will be allowed, the decrees appealed from will be reversed, and the suits dismissed with costs throughout of the 1st defendant to be paid by the 1st respondent. Appeal No. 425 of 1914 is also allowed with costs against the 1st respondent. In Mr. T. R. Ramachandra Aiyar's Appeals Nos. 380 of 1914 and 349 to 351 of 1915, we reverse the decrees appealed from, and dismiss the suits with costs throughout of the 1st defendant to be paid by the plaintiff. His Appeal No. 381 of 1914 against the decree in Original Suit No. 26 of 1912 dismissing his client's suit must be dismissed with costs of the 1st, 2nd and 3rd defendants (one set).

Burn, J.

Burn, J.:—I agree with the learned Chief Justice in holding that the decree from which Appeal No. 380 of 1914 is preferred should be reversed. There can be no doubt that the real object of the litigation is not the securing of a declaration with regard to the transactions of comparatively little importance which are being impugned but the determination of the question of who the nearest reversioner is with a view to claims to succession on the death of the Zemindarni.

As the suit is being dismissed on other grounds, it is unnecessary to record any finding on the merits of the claims put forward by the appellant and 1st respondent in Appeal No. 380 of 1914. As however the questions have been fully argued, it may be as well to indicate briefly the view I am inclined to take on some of the principal contentions which have been relied on in the course of the argument.

The last male holder was Navaneetha Krishna Maruthappa Thevar who died on 16th December 1891. The rival claimants are his maternal uncle Navaneetha Krishna Thevar (appellant in Appeal No. 380 of 1914) and Ramaswami Pandia Thalavar (1st respondent in Appeal No. 380 of 1914). The right of the former to be considered a reversioner was disputed and was found against in the lower Court but it is conceded that this finding cannot be supported. The latter claims descent from the grandfather of the last male holder as the son of his daughter by his second wife. If this claim be established, the 1st respondent's rights are admittedly superior to those of the appellant. The question at

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issue regarding his possession is now narrowed down to this. Whether his grandmother was the wife or the concubine of the Zamindar who died in 1850. If she was a wife, he is entitled to succeed. If she was a concubine, his claim fails.

The marriage is alleged to have taken place in or about the year 1845, and the production of reliable direct evidence is a matter of great difficulty. The previous litigation in which one of the questions in issue was whether the present Zemindarni was a wife or a concubine illustrates this point. (Exhibit MMMMM and *Annapurni Nachiar* v. *Collector of Tinnevelly* [1]. It also affords an instance of masses of unreliable oral evidence being produced by both parties. The oral evidence in the present case is, in my opinion, of very small value. I should not be prepared to act on the assertions of the witnesses for either party except where their testimony is corroborated by the documents on the record or by circumstances established independently

The Zamindar was about 50 years of age in 1845. It has been urged that it is highly improbable that a man of this age possessed of a wife, a legitimate son, and one concubine would have contracted another marriage. The parties are Maravars. It was open to the Zamindar to take to himself further wives or concubines. A fresh marriage might be unpopular in his own household, but I do not think any presumption can be raised as to how a particular individual would act under these circumstances.

The Subordinate Judge gives some credit to the statements of three out of the four witnesses who have deposed to their presence at the marriage. Plaintiff's witnesses Nos. 7 and 13 make absurd statements as to the year of the marriage and P. W. 14 is shown to be unreliable in another connection. No weight can be attached to this evidence. The case of the appellant is that 1st respondent's grand-mother was a dasi who had been duly initiated, and had followed her calling in the usual way for some years at least. The fact that the Zamindar was the father of her child was denied. The subsequent treatment of this daughter (Gnanapurani) and her descendants is inconsistent with any doubt as to the Zamindar having been her father. This contention has now been given up. The importance of establishing that Gnanapurani's mother was a dasi lies in this, that if the fact be proved she could not have been

1. (1895) I. L. R. 18 M. 277=5 M. L. J. 121

the lawful wife of the Zamindar. There is no documentary evidence such as temple registers to support the allegation. The first public suggestion that she was a dasi appears to have been made in 1892 and a motive for the accusation is shown to have existed. The oral evidence on the point has been examined in detail by the Subordinate Judge and has been rightly discredited by him. The witnesses are nearly all persons of no position whose statements are discrepant and in many particulars inconsistent with facts as ascertained from documents the authenticity of which is not in dispute.

The 1st respondent has sought to establish that his grand-mother was Gomathimuthu, the youngest daughtor of Kaduvetti Maruthappa Thevar. The Kaduvetti family was one of some importance with members of which the Uttumalai Thevars might well intermarry. The present Zamindarni is connected with it. The 1st respondent's case, if established, would show that his grand-mother was a suitable bride for the Zamindar and would also raise a presumption that she would not have consented to live with him as a concubine. The earliest details as to the pedigree of Gomathimuthu are given in the course of some litigation in 1894. The stock to which she claimed to belong was however referred to incidentally in 1892 (Exhibits T and TTTT). The chief evidence bearing on this matter comes from members of the Kaduvetti family. Several have been examined on either side and they have supported the parties calling them. There is no doubt that one set of witnesses or the other is giving deliberately false evidence. The statements have been successfully criticised by the learned pleaders on either side. The reasons given by the Subordinate Judge for accepting the version of the plaintiff are not convincing. If it be unlikely that plaintiff's witnesses would claim relationship to a dancing girl, it is also unlikely that the defence witnesses would convert a near relation into dasi to support the appellant's case. There is a curious absence of any evidence of intercourse between Gomathimuthu and her own family during her long residence in Veerakeralempudur and Uttumalai. It is also a significant fact that in Exhibit XXXVII, the order of the Collector of Tinnevelly, dated 17th January 1853, excluding Maruthappa Thevar from the Uttumalai limits, no reference is made to the fact that his own daughter was then living in the palace at

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Veerakeralempudur. The evidence for the plaintiff falls short of establishing the relationship upon which he relies.

The appellant relies on the evidence regarding the treatment of plaintiff's grandmother both before and after 1850 as being inconsistent with marriage. It is also contended that official records lead to the conclusion that the Zamindar was survived by one widow only.

As to treatment prior to 1850, the main fact relied upon is the admission that plaintiff's grandmother did not live in the main building at Veerakeralempudur palace but in a thatched structure detached from the rest of the residence. It was called "*Thottikattu.*" The lady was distinguished by this name at times and the portion of the Uttumalai palace which she subsequently occupied is described by the same name. It is suggested that a distinction was drawn between her and the lawful wife by attaching to her the name of the building which she occupied while under the Zamindar's protection.

The records referred to above, relate to the inquiries and reports made by the Board of Revenue and the Collector of Tinnevelly on the death of the Zamindar in 1850. Only one document was admitted in evidence by the Subordinate Judge but for reasons given by the learned Chief Justice in his judgment two more have been admitted now. These are the reports of the Muzumdar of Tenkasi, dated 7th October 1850, and the Collector's takid, dated 2nd October 1850 to which it was a reply. Unfortunately, the whole correspondence is not produced. The earlier reports cannot have been inconsistent with those now before the court but the later reports would have thrown a great deal of additional light on the state of the family of the deceased Zamindar. This appears from the inquiries made by the Collector in his takid of 2nd October 1850. The takid was not replied to as a whole. The answers to the questions bearing directly on the matter now in issue are not filed. The arzi of 7th October 1850 is a reply urgently called for as to the management of the property. The whole of the correspondence produced relates to this matter only and this has to be borne in mind in judging of its evidentiary value. The Zamindar died on 23rd September 1850, and the Collector's report which is incorporated in Exhibit XXXIII was submitted on 18th Octobor 1850. Prior to the despatch of this report, the Collector had received arzis from the Muzumdar

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and had been interviewed by the minor son of the late Zamindar with the Estate agents. The documents show that the Muzumdar asserted that the Zamindar had had one wife only and lead to the inference that up to the 18th October the Collector had heard nothing of a second wife. If a second wife existed the fact must have been well known. It seems unlikely that the local officials would have dared to suppress the fact, yet the Collector could hardly have been kept in ignorance of it except by wilful suppression by the Muzumdar, the minor, and kariastans. It may be safely assumed that, whether plaintiff's grandmother was a wife or concubine, there was no dispute as to her status in 1850. If any such question had been raised, it is almost inconceivable that the friendly relations which subsisted for so long could have been maintained. As to treatment subsequent to 1850, the Advocate General for the 1st respondent has laid great stress on the fact that the plaintiff's grandmother and her daughter lived in Thottikattu building during the minority of the young Zamindar, while his mother was managing his property and until 1868. This is another matter which renders improbable the appellant's account of the origin and past career of the plaintiff's grandmother. It has however to be remembered that there is no wide gulf fixed in the community to which the parties belong between the position of a wife and a permanent concubine. The case for the plaintiff rests mainly on the inference to be drawn from the treatment accorded to his grandmother and her descendants by the Zamindar Hirudalaya Maruthappa Thevar who succeeded in 1850 and died in 1891. Letters, accounts and orders for the period from 1876 to 1890 are relied upon. It appears that there is a quantity of older records in possession of the Agent of the Court of Wards which is now managing the Estate. Neither party seems to have taken prompt and effective steps to have these examined. There seems to me to be no good reason for supposing that the attitude assumed by Hirudalaya from 1876 onwards differed from that taken up previously. The genuineness of the accounts and orders is not disputed and objections have been raised to only a few of the letters. Exhibits QQQQ and RRRR series are impugned and the Advocate General stated that he did not regard them as adding anything material to the strength of his case. Exhibits H and J are of importance if it be proved that they were sent by or with the approval of the present Zamindarini. The evidence as to this is unsatisfactory.

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With regard to the undisputed documents, the 1st respondent contends that they establish that Hirudalaya addressed plaintiff's grandmother, her daughter Gnanapurani, and their descendants in terms which indicate legitimate relationship, that he had marriages and other ceremonies conducted for them at his expense, and that he made provision for Gnanapurani on a scale appropriate to her position as his legitimate sister. The explanation tendered for the appellant is that there is nothing in any of these acts inconsistent with his case as to the nature of the union between the Zamindar and Gnanapurani's mother. There is no doubt that Gnanapurani was married at the Zamindar's expense and into a respectable family. Hirudalaya was present at the ceremony. Marriages and various other ceremonies for her children were also conducted at the expense of the Estate. The facts do not by themselves prove that the relationship was legitimate but they certainly form important material for consideration along with the other evidence. In this connection, it has to be remembered that plaintiff's grandmother and her descendants appear to have been the only near relatives of Hirudalaya and that as regards Gnanapurani's descendants they were of legitimate birth. The appellant contends that Hirudalaya did not attend in person that the expenditure was on a small scale and not in excess of that incurred on ceremonies connected with other relatives more distantly connected than a step-sister. It is further pointed out that the marriages of Gnanapurani's daughters were not celebrated at the Zamindar's headquarters, while the reverse was the case with some other relatives. There is no clear direct evidence that Hirudalaya attended the marriages and other ceremonies performed for Gnanapurani's off-spring but there is also nothing which indicates that he did not attend. It is admitted that he was present at the marriage of Gnanapurani and there is nothing unlikely in his having attended the marriages of her children. The scale of expenditure appears to have been fairly lavish in connection with the earlier ceremonies at least, and I am unable to find that there is anything in the comparison instituted by the appellant to help his case. The marriages referred to as having been celebrated at Veerakeralampudur were of girls who were permanently living there. After all, Uttumalai was also a palace of the Zamindar and little importance can be attached to the fact that the marriages took place there.

The correspondence relates to the time when plaintiff's grandmother and the daughter had moved to Uttumalai. It shows that Hirudalaya took a deep interest in all the affairs of the family and that he addressed the members of it by terms which indicate close relationship. No doubt some of the terms used, for example, to Gnanapurani's husband and her descendants are reconcilable with his mother having been the Zamindar's concubine and not his wife. Instances are given in the evidence in which forms of address literally denoting close relationship were used to persons who were no relations at all. It is common knowledge that this practice prevails. There are however other letters especially those in which Hirudalaya refers to plaintiff's grandmother as his "mother" and subscribes as her "son" and some in which he refers to his own wife as "your daughter-in-law" which cannot be explained away so easily. It is not enough to say that they are mere polite exaggerations. Zamindar Hirudalaya made considerable grants of pannai lands in favour of Gnanapurani and he appears to have managed them on her account. Subsequently in 1885, he purchased Naduvakkurichi Mitta for her at a cost of Rs. 22,000. There is no clear evidence of any specific provision having been made for her mother. The latter must, of course, have been maintained from the Estate. The Subordinate Judge draws the inference that Gnanapurani would not have been treated in this way unless she had been a legitimate sister. This does not necessarily follow. The question rather is whether the cumulative effect of the evidence as to the treatment of his relations by Hirudalaya is sufficient to override the inference to be drawn from what happened in 1850 and to establish the plaintiff's case.

The last point to which I propose to make reference is the contention for the appellant that the delay in putting forward plaintiff's claim is fatal to its success. During the life-time of Hirudalaya Thevar, Gnanapurani and her nother were well provided for, and there is nothing to indicate that any occasion arose on which it was necessary for them to assert their position as legitimate relations. On his death the claim was put forward at once. Vide Exhibit UUUU, dated 14th August 1891, and was repeated on several occasions. It is referred to in the Collector's report, Exhibit XXII, dated 12th September 1891. The fact that Minakshi Sundara Nachiar denied that the relationship was legitimate is also mentioned. It is stated that the claim is "not very seriously pressed" and it does not appear that any

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inquiry was made about it. There were at the time two persons alive who claimed to be widows of the last Zamindar and also an adopted boy. It is true that the claim put forward by Gnanapurani was to immediate possession of the Zamindari on behalf of herself and her sons but unless and until the other claimants' right could be got out of the way, Gnanapurani would have no chance of success. Under the circumstances, no great importance can be attached to the failure to press the claim at this juncture. After the death of the adopted boy, an interpleader suit was filed by the Collector of Tinnevelly with a view to determining the rights of the ladies who claimed to be widows of the late Zamindar. It is urged that Gnanapurani and her sons would have intervened in this litigation had they believed in the status they claimed. Assuming that it was open to them to intervene it may well be that they saw the difficulty of establishing any present right to possession as against both the other claimants. Subsequent to this litigation, it does not appear that with one exception any suitable occasion offered itself for the assertion of these claims in court. Meenakshi Sundara was in possession as limited owner. An alienation of hers was questioned by one of the plaintiff's brothers in Original Suit No 54 of 1907. The mortgage to which the suit related was however paid off after institution of the suit, and the suit was withdrawn before contest. No claim was made by Gnanapurani's mother for maintenance until 1911, but she had been living with her daughter and as has been seen, ample provision had been made for the latter. Under the circumstances, I do not think that any adverse inference can be drawn from the delay in bringing this suit.

There was a good deal of litigation between the representatives of the Uttumalai Estate and Gnanapurani which turned upon whether she was a tenant in respect of the pannai lands which had been granted to her by Hirudalaya. She consistently based her rights on a gift made in consideration of her relationship. The dispute was eventually compromised. On a consideration of the evidence on this point, I cannot see that any inference unfavourable to the plaintiff is necessary.

I purposely refrain from expressing any opinion on the effect of the evidence as a whole.

I agree with the judgment of the learned Chief Justice as regards the connected appeals.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE BAKEWELL.

Ponnaloori Ellamandayya ... *Appellant* * *(Plaintiff).*

v.

Chelakapathi Lakshmayya and others ... *Respondents (Defts. 1, 3 & 4, 2nd Deft.'s L. R. & 5th deft.)*

Ponnaloori Ellamandayya v. Chelakapathi Lakshmayya.

Evidence Act, S. 108—No presumption as to the death of a person at a particular time—Person relying on the fact, bound to establish it by evidence—No presumption that a person died leaving no heirs.

In 1912, plaintiff alleging himself to be a reversioner, sued for possession of the estate of the last male owner, whose widow had died in 1909. The defendants among other pleas, stated that one G. a nearer reversioner was alive when the widow died and that the plaintiff was excluded by him. In answer to this averment plaintiff stated that G. was not heard of for 30 years and that the presumption therefore was, that he was dead in 1909.

Held, that, though G. was not heard of for 30 years before suit, there was no presumption that he was dead in 1909 when the inheritance opened and the plaintiff having failed to prove that G. was dead in 1909, his suit must be dismissed.

It is for the party who founds a right upon the fact of a person having died at a particular time to establish that fact affirmatively by evidence; the evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail.

Srinath Das v. *Proboth Chander Das* [1], *Narki* v. *Lal Sahu* [2], *Muhammad Shariff* v. *Bande Ali* [3], *Veeramma* v. *Chenna Reddi* [4], In re *Phene's Trusts* [5], referred to.

Held further, that the Lower Appellate Court acted rightly in disallowing the plaintiff's application to amend the plaint by claiming title as the heir of G. for there was no guarantee that plaintiff was the heir of G. and there was no presumption arising from the presumption of the death of an individual that he left no heirs of his own behind him. *Jackson* v. *Ward* [6], referred to.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Guntur in A. S. No. 25 of 1915 preferred against the decree of the Court of the District Munsif of Ongole in O. S. No. 638 of 1912.

The Court delivered the following

P. Rajagopala Aiyangar for *P. Narayanamurthi* for Appellant.

T. V. Venkatarama Aiyar and *Rajagopala Aiyar* for Respondents.

Judgment:—This is a suit by a person alleging himself to be a reversioner for possession. The widow of the last male owner

* S. A. No. 2018 of 1915. 20th April, 1917.

1. (1910) 11 C. L. J. 580.
2. (1909) I. L. R. 37 C. 103.
3. (1911) I. L. R. 34 A. 36.
4. (1912) I. L. R. 37 M. 440.
5. (1869) L. R. 5 Ch. A. 139.
6. (1907) L. R. 2 Ch. 354.

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died in 1909. The suit was instituted in 1912. The defendants among other pleas stated that one Guruviah *alias* Gurunadham, a nearer reversioner was alive when the widow died and that the plaintiff was excluded by him. In answer to this averment the plaintiff stated that Guruviah was not heard of for thirty years and that the presumption therefore was that he was dead in 1909.

The Courts below, in our opinion, rightly held that although Guruviah was not heard of for thirty years before suit, there was no presumption that he was dead in 1909. Mr. Rajagopalachariar who has argued this case with great insistence contested this proposition. He argued that the presumption must be raised with reference to the event which is the basis of the action and not with reference to the date of the suit. The language of S. 108 of the Evidence Act, in our opinion, does not support this contention. The word *question* in that section has reference to the point raised in the suit. The law of Evidence prescribes rules for the mode of proof in Courts, and it is with reference to the matter that is in issue in the suit, the rules are to be applied. The authority of Mookerjee, J., in *Srinath Das* v. *Probodh Chunder Das* [1]. *Narki* v. *Lal Sahu* [2]. and *Muhammad Sharif* v. *Bande Ali* [3], all support this proposition. *Veeramma* v. *Chenna Reddi* [4], approves of the Calcutta and Allahabad decisions. The learned vakil for the appellant has not convinced us that these decisions are wrong. He strongly relied on the decisions of Karamat Hussain, J., in *Mussammat Akbari* v. *Sayad Bashir Ali* [5]. The view of the learned Judge was expressly overruled by the Full Bench in *Muhammad Sharif* v. *Bande Ali* [3]. Further it is clear that the learned Judge has misread the decision in *In re Phene's Trusts* [6], upon which he based his conclusions. The statement of law by Lord Justice Gifford at page 151 of that volume leaves no room for doubt that it is for a party who wants the court to presume in the trial that a person was dead at a particular time to establish that position.

Neville v. *Benjamin* [7], does not help the appellant. In that case it was found that the son of a testator was not heard of since 1892. The testator made a will and died in 1893. The

1. (1910) 11 C. L. J. 580.
2. (1909) I. L. R. 37 C. 103.
3. (1911) I. L. R. 34 A. 36.
4. (1912) I. L. R. 37 M. 440.
5. (1910) 8 I. C. 55.
6. (1869) L. R. 5 Ch. A. 139.
7. (1912) 1 Ch. 723.

administrators of the son's estate claimed the legacy made to the son in the will. It was held that they should prove that the son was alive in 1893 when the father died. This is also what S. 108 lays down. The principle to be applied in such cases is clearly laid down by Sir G. M. Gifford, L. J., in *In re Phene's Trusts* [1], in these terms: "The true proposition is, that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence; the evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail." Applying this test, we hold that the appellant has failed to prove that Guruviah was dead in 1909.

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Another contention of the learned vakil is that his client should have been allowed to amend the plaint by claiming title as the heir of Guruviah. We see no reason for interfering with the discretion of the Lower Appellate Court in this matter. Moreover, there is no guarantee that the plaintiff is the sole heir of Guruviah because as was pointed out in *Jackson* v. *Ward* [2], there is no presumption arising from the presumption of the death of an individual that he left no heirs behind him.

We hold that the Courts below are right and dismiss the second appeal with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE BAKEWELL.

Obla Venkatachalapathi Aiyar and another ... *Appellants* * (*Defendants 3 and 4*).

v.

Thirugnana Sambanda Pandara and others. ... *Respondents* (*Plaintiff and Defendants 1, 2 and 5*).

Guardians and Wards Act Ss. 7 (a) and 29—Head of a mutt—Minor—Trust property—Appointment of guardian—Sale of property under sanction of Court for discharging debts of predecessor-in-office — Proceedings without jurisdiction — Matadhipathi, position and powers of.

Obla Venkatachalapathi Aiyar v. Thirugnana Sambanda Pandara.

During the minority of the plaintiff, the head of a *mutt*, the District Court purporting to act under S. 7 of the Guardians and Wards Act appointed a guardian of his person and property. To discharge the debts contracted by the predecessors-in-office of the plaintiff some of the properties were sold by the guardian

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* S. A. No. 1686 of 1916. 19th April, 1917.

1. (1869) L. R. 5 Ch. A. 139. 2. (1907) L. R. 2 Ch. 354.

Obla Venkatachalapathi Aiyar v. Thirugnana Sambanda Pandara.

with the sanction of the court under S. 29 of the Act. *Held*, that the properties in question being trust properties, the orders of the District Court appointing a guardian and sanctioning the sale of the properties were wholly without jurisdiction and that the sale was liable to be set aside.

A *Dharmakarta* of an endowment has ordinarily no beneficial interest in the surplus income of the endowment, though in a given case such a right may be established either by the custom of the institution or otherwise. A right to a portion of the income of the trust estate does not vest the property in the beneficiary so as to attract the operation of Ss. 7 and 29 of the Guardians and Wards Act.

Quære:—Whether the decision of the Judicial Committee in *Ram Parkash Das* v. *Anand Das* [1] is not confined to the class of mutts under the consideration of the Board in that case, and whether the decision in *Balusami Iyer* v. *Venkitasami Naicker* [2] does not lay down the rule too broadly?

Second Appeal against the decree of the District Court of Ramnad at Madura in A. S. No. 237 of 1913 preferred against the decree of the Court of the Subordinate Judge of Ramnad in O. S. No. 65 of 1909.

K. V. Krishnaswami Aiyar for *A. Krishnaswami Aiyar* and *K. C. Gopaladesikan* for Appellant.

The Hon. the Advocate-General (S. Srinivasa Aiyangar) and *T. V. Gopalasami Mudaliar* for the Respondent.

The Court delivered the following

Judgment:—During the minority of the plaintiff, the court purporting to act under S. 7 of the Guardians and Wards Act appointed one Vaidyalinga Thambiran as the guardian of his person and property. As there were debts contracted by the predecessors of the Matadhipati, sanction was obtained under S. 29 of the Act to sell some of the properties of the mutt. The present appellants are the successors in interest of those who purchased the properties in pursuance of the order of the District Judge.

The minor Pandarasannadhi has attained age and now sues to set aside the sales. The Lower Appellate Court gave a decree to the plaintiff. In this Second Appeal, Mr. K. V. Krishnaswami Aiyar contended that the properties of the mutt are not trust properties and that it was competent to the District Court to have appointed Vaidyalinga Thambiran as guardian under the Act. It may become necessary to consider on some future occasion whether the decision of the Judicial Commitee in *Ram Parkash Das* v. *Anand Das* [1] that the mutt properties partake of the nature of the trust properties should not be confined to the class of mutts under the consideration of the Board and whether the decision in *Baluswami Iyer* v. *Venkitaswami Naicker* [2] does not lay down the

1. (1916) I. L. R. 43 C. 707; 31 M. L. J. 1. 2. (1916) 32 M. L. J. 25.

Obla Venkatachalapathi Aiyar v. Thirugnana Sambanda Pandara.

proposition too broadly. We do not think it necessary to decide that question now.

In the present case, there is ample evidence to support the finding that in its inception the properties endowed were given to the head of the mutt as trustee. It has not been shown that the particular properties in suit are different in character from the originally endowed properties. We must therefore hold that the properties in suit are trust properties. Consequently under Sec. 7, Cl. (a) no guardian should have been appointed. S. 29 which gives, power to sell the immoveable properties of the minor was therefore, wrongly invoked.

Mr. Krishnaswami Aiyar contended that as the District Judge has found that the head of the mutt had a beneficial interest in the surplus income, the properties belonged to the minor, and that the appointment of guardian was valid. In the first place, we are unable to agree with the District Judge that a Dharmakartha has ordinarily a beneficial interest in the surplus income: It is just the other way. In a given case, such a right may be established, as pointed out by Bashyam Iyengar, J. in *Vidyapurna Thirthaswmi* v. *Vidhyanidhi Thirthaswami* [1]. The District Judge does not find that in this institution, either by custom or otherwise, a right in surplus income was secured to the trustee. But apart from this, we are unable to agree with the learned vakil that a right to a portion of the income would vest the property in the beneficiary, so as to attract the provisions of Ss. 7 and 29 of the Guardian and Wards Act. The decision in *St.Thomas's Hospital (Governors)* v. *Richardson* [2], proceeded upon the special language of the statute and should not be be applied to control the clear language of the Guardians and Wards Act.

We must therefore hold that the order of the District Court appointing Vaidyalinga and the proceedings taken thereunder were wholly without jurisdiction. The decision of the District Judge is right and we dismiss the second appeal with costs.

We express no opinion on the question whether the appellants are not entitled to recover for the trust properties the monies which were legitimately applied to meet the necessary expenses of the mutt.

A. V. V.

1 (1904) I. L. R. 27 M. 435. 2. (1910) I. K. B. 271.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE NAPIER.

Janaki Ammal ... *Petitioner * in both (Appellant in Privy Council Appeal No. 105 of 1914 against the decree of the High Court in A. S. No. 22 of 1908).*

v.

Narayanaswami Aiyar ... *Respondent in both (Respondent in do.)*

Janaki Ammal v. Narayanaswami Aiyar.

Civil Procedure Code,—O. 45, R. 15—Privy Council—Decree of—Transmission for execution—True copy of order in council filed with application for—Certified copy not filed because it had miscarried—Effect—Construction of O. 45, R. 15—Principle—High Court—Fee certificate for costs incurred in—Time for filing—High Court decree directing each party to bear his own costs—Reversal of decree by Privy Council—Effect.

The provisions of O. 45, R. 15 of the Code of Civil Procedure should not be construed as restricting the only possible evidence of an order of His Majesty in Council to a certified copy thereof, but as directory words with the object of ensuring that the proper information upon the subject of any order in council should be supplied to the Courts in India.

Where along with an application for transmission of a decree of the Privy Council for execution a true copy of the order was filed, the certified copy not having reached the petitioner by reason of its having miscarried, *held* the provisions of O. 45, R. 15 were sufficiently complied with and that the decree could be transmitted.

Where the High Court ordered by its decree each party to bear his own costs but that decree was reversed by the Privy Council which allowed to the appellant before it his costs incurred in the High Court also, *held*, that a fee certificate filed by the pleader for the appellant in the High Court in respect of fees received by him was not out of time because it was not filed within the seven days allowed by the rules.

Civil Miscellaneous Petitions praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to transmit for execution to the Court of the Subordinate Judge of Mayavaram the plain printed copy of the decree of His Majesty in Council in Privy Council Appeal No. 105 of 1914 preferred against the decree of the High Court in A. S. No. 22 of 1908 (O. S. No. 30 of 1907 on the file of the Court of the Subordinate Judge of Mayavaram) and above C. M. P. No. 460 of 1917 to order the return of the securities deposited by the petitioner for the costs of the respondent in the appeal to His Majesty in

* C.M.P. Nos. 460, 461 and 922 of 1917. 12th April, 1917.

Council in the said Privy Council Appeal No. 105 of 1914 and also of the interest that may have accrued thereon, and to order the refund of the balance of amount lying to the credit of the petitioner after defraying the expense for the printing and transmission of the printed record in the said Privy Council Appeal and to set aside the order of the Registrar of the High Court and to direct a resettlement of the taxation of costs after hearing the petitioner herein.

C. A. Seshgiri Sastri for the Petitioner.

T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar* for the Respondent.

The Court delivered the following

Judgment:—The first objection taken to the transmission of the decree of the Privy Council for execution is that the original order in Council has not been filed in this Court and therefore there is no 'certified copy' which should accompany the application for execution as required by Order XLV, Rule 15 of the Code of Civil Procedure, 1908. The facts set out in C. M. P. No. 460 of 1917 and the affidavit of the petitioner explain how the original order has miscarried and has not yet reached the petitioner. The order was passed about the end of July 1916 and since the successful appellant before the Privy Council has not yet received the original order, he has put in a plain printed copy of the order in Council along with his petition and asks us to transmit the decree for execution to the lower Court.

We think the principle of the decision of the Privy Council in *Hurrischandra Chowdhry* v. *Kali Sundari Debi* [1] applies to a case like this. As pointed out there, the provisions of S. 610 of the old Code of Civil Procedure, which corresponds to Rule 15 of Order XLV of the present Code should not be construed as restricting the only possible evidence to the certified copy, but as directory words with the object of ensuring that the proper information upon the subject of any Order in Council should be supplied to the Courts in India. No doubt the order in Council in that case was in possession of the opposite party and he neglected to file it. But the principle applies to the present case and we are satisfied upon the affidavit and other materials placed before us that the plain printed copy filed along with the petition is a true

1. (1882) L. R. 10 I. A. 4=I. L. R. 9 C. 482. (P. C.)

Janaki Ammal v. Narayanaswami Aiyar.

copy of His Majesty's order in Council. In fact this is not denied. The case *Janaki Ammal* v. *Narayanaswami Aiyar* [1], has also been reported in the authorised reports in I. L. R. 39 M. 634 where the decree is given in the same terms as in this plain copy. We have been referred to a case in the Allahabad High Court (*Damodar Das* v. *Brij Lal* [2].) But there it appears that there was no copy of the order in Council at all before the executing Court, but only the judgment or recommendation of their Lordships of the Privy Council. That is not the case here.

Another objection has been urged by the learned pleader for the respondent that the Registrar did not give notice to him at the time of taxing the costs. We have however heard what objections he has to urge as regards the costs as taxed, and his principal objection is that no pleader's fees should have been allowed in this Court because no certificate of fees was filed *within seven days as required by the rules.* But then the order of this Court as regards costs was that each party was to bear his own costs and therefore it was not expected that the pleader would file any certificate of fees. That order has, however, been reversed by their Lordships of the Privy Council. We think in the circumstances, the Registrar was right in accepting the certificate of fees.

C. M. P. Nos. 460 and 461 of 1917 are therefore allowed.

C. M. P. No. 922 of 1917 is dismissed with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—Mr. Justice Spencer and Mr. Justice Srinivasa Aiyangar.

Ponnusami Naiken ... *Petitioner* (Plaintiff)*

v.

Nadimuthu Chetti ... *Respondent (Defendant.)*

Ponnusami Naiken v. Nadimuthu Chetti.

Contract Act, Ss. 16 and 74—Excessive rate of interest—Relief against, grounds for—'Penalty,' meaning of.

A promissory note provided for payment, on demand, of the principal sum with interest at about 172 per cent. per annum. In a suit upon the promissory note, the Court below reduced the rate of interest to 24 per cent on the ground that the contract rate was excessive and extortionate. No evidence was taken in the case and there was no proof of undue influence.

Held, that the court below erred in giving relief merely on the ground that the rate of interest was excessive.

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*C. R. P. No. 805 of 1916. 4th May 1917.

1. (1916) 31 M. L. J. 225
2. (1915) I. L. R. 37 A. 567.

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A contract to pay a heavy rate of interest is not. by itself, a penalty so as to be relieved against. Under S. 74 of the Contract Act, for a sum named to be treated as a penalty, it must be an amount to be paid in case of a breach of the contract (*i. e.*,) breach of an antecedent promise.

Cases on the point reviewed.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Tanjore in S. C. S. No. 343 of 1916.

V. Purushotam Aiyar for the Petitioner.

C. Krishnamachariar for *G. S. Ramachandra Aiyar* for the Respondent.

The Court delivered the following

Judgment:—The defendant borrowed Rs. 30 from the plaintiff and executed a promissory note promising to pay on demand the principal with interest at one rupee per week, *i.e.*, at about Rs. 172 per cent. per annum. In a suit on the note the Subordinate Judge reduced the rate of interest to 24% on the ground that the contract rate was extortionate. He took no evidence and does not find that the contract was procured by undue influence as defined and explained in S. 16 of the Contract Act. The question is whether the Judge had power to reopen the contract and reduce the rate of interest.

The argument in support of such a power is rested on two grounds. It was argued that there is a head of equity apart and distinct from 'undue influence' which would enable a Court of Equity in England to reopen a contract which the court thought 'hard or unconscionable' and that the British Indian Courts which are also courts of Equity can exercise the same jurisdiction apart from and outside the provisions of the Contract Act. This argument appears to proceed on a misapprehension of the English doctrine as to harsh and unconscionable bargains and is further opposed to authority. As we understand the law, the fact that a bargain appears to the court hard or unconscionable, is not by itself sufficient ground for equitable relief, but there must be some disparity in the position of the parties actual or presumed or some circumstance, such as surprise ignorance, distress or even poverty which prevented the parties to the transaction from meeting on equal terms. A theory of constructive fraud was developed which included cases of undue influence strictly so called of which *Huguenin* v. *Baseley* [1] was the type and

1. (1807) 14 Ves. 273=9 R. R. 276.

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cases of unconscionable bargains of which *Earl of Chesterfield* v. *Jansen* [1] was the type. Both these classes were based on the common principle that where one person is in a position to dominate the will of another either on account of antecedent relationship or because of the circumstances attending a particular transaction so as to prevent that other from giving an intelligent or free consent to the bargain, the person who obtained an undue advantage by using his position should not in justice be allowed to retain it. What those circumstances were the Courts declined to define. To the substantive doctrine, there were added certain rules of evidence or presumption which in some cases subsequently crystallised into rigid rules of law as in the case of sales of reversions and certain other dealings with expectant heirs necessitating the interference of the legislature. The Indian Legislature has included all these matters in a comprehensive definition or explanation under the head of undue influence, in S. 16 of the Contract Act. The section as originally enacted was found inadequate to meet all cases and has therefore been amended and re-enacted in 1899. Clause 3 of S. 16 is in substantial accord with the English Equity doctrine as to unconscionable bargains, though in its application the different circumstances of this country will have to be taken into account; for instance as the English Courts invented the class 'Expectant heirs', we have developed the class of Pardanashin women. At the same time inasmuch as Courts of Equity in England and following them the Courts here did not in this class of cases wholly set aside the transaction, but gave relief only on terms, a new Section 19-A was added to give effect to this rule. In *Dhanipal Das* v. *Raja Muneshwar Baksh Singh* [2] Lord Davey said "Apart from a recent statute (Money Lenders Act) an 'English Court of Equity could not give relief from a transaction or contract merely on the ground that it was a hard bargain, except perhaps where the extortion is so great as to be itself evidence of fraud. In other cases there must be some other equity arising from the position of the parties or the particular circumstances of the case". The same case is also authority for the position that we are not entitled to travel outside the provisions of the Contract Act, and invent a new head of equity; and the same principle has been acted upon in several recent cases in this Court. *Ranee*

1. (1750) 2 Ves. Sen 155.
2. (1906) L. R. 33 I. A 118 at p. 127·28 All. 570.

Annapurni Nachiar v. *Swaminatha Chettiar* [1] and *Kesavelu Naidu* v. *Arithulai Ammal* [2]. The decisions of the Judicial Committee in *Srimati Kamini Sundari Chowdhrani* v. *Kali Prosonno Ghosh* [3] and *Rajah Mokhan Singh* v. *Rajah Rup Singh* [4], which were strongly relied on by the respondent are not authorities to the contrary. The first of these cases falls within Clause 3 of S. 16. Though that clause has not been enacted when the decision was passed, it must be remembered that the rule embodied in it has always been acted upon as a rule of evidence and the burden of proof laid on the party supporting the transaction. Their Lordships carefully point out the circumstances which showed that the parties were not meeting on equal terms. It was the case of a pardanashin and her muktiar and their Lordships cited the decision of the Master of the Rolls in *Benyon* v. *Cook* [5], as correctly laying down the law. The transaction in *Benyon* v. *Cook* [5], was with a person who came under the class of 'expectant heirs'. The Master of the Rolls in the opening sentences of his judgment determines first that the party seeking relief came within that class and then considers whether the bargain was unconscionable. Their Lordships no doubt say in a previous portion of the judgment that the finding of the lower court against fraud and undue influence must be accepted; that apparently means that there was no proof of actual imposition in the case. In *Mokhan Singh* v. *Rup Singh* [4] the transaction was with a person in a position analogous to that of an expectant heir. Even in cases of specific performance, the mere fact that the bargain was harsh or onerous is no defence. *See Davis* v. *Maung Shwe Go* [6]. It may also be pointed out that the words 'harsh and unconscionable bargains' are oftentimes used so as to include the element of inequality in the position of the parties. We are therefore unable to accept this argument.

It was then contended that the contract to pay a heavy rate of interest is by itself a stipulation by way of 'penalty' and can be relieved against under S. 74 of the Contract Act. Though the distinction between 'penalty' and 'liquidated damages' was abolished by the Contract Act, and however wide the powers of a court may be to relieve against all stipulations which it considers penal irrespective of the language of the Contract, it is quite clear

1. (1910) I. L R 34 M. 7=20 M. L. J. 785. 2. (1912) I. L. R. 36 M. 533.
3 (1885) L R. 12 I. A. 215=I. L. R. 12 C. 225. 4. (1893) L. R. 20 I. A. 127.
5. (1875) 10 Ch. A. 389.
6. (1911) L. R. 38 I. A. 155=38 C. 805.

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that there cannot be a stipulation by way of penalty unless there is another antecedent promise; for the section says, that for the sum named to be treated as a penalty, it must be an amount to be paid in case of a breach of the contract, *i.e.*, breach of an antecedent promise; a promise for consideration is a contract. 'Any other stipulation by way of penalty' similarly means a provision intended to secure the performance of the main contract. As stated in Bouvier's Law Dictionary 'a penalty always includes two distinct engagements.' If courts have power to relieve parties from their main contracts as stipulation in the nature of penalty whenever they think the bargain was harsh or unconscionable there would in many cases be no need for any investigation as to whether undue influence was exercised or fraud practised in the obtaining of the contract. Several cases were cited by the respondent, but there is no case in this court which in any way lends support to his argument; on the other hand in *Annamalai Chettiar* v. *Veerabadram Chetty* [1], and in *Venkataramiah Pillai* v. *Subramania Pillai* [2], decided very recently, (both of them cases of loans), the distinction between the primary obligation to repay the *loan with interest as agreed to*, and a penalty stipulated to be paid on its breach was kept up. The learned Judges while relieving against the penalty felt themselves bound to give some compensation for the breach of the contract beyond enforcing it. In *Surya Devara Seetharamayya* v. *Suryadevara Kotayya* [3], Ayling, J., clearly explained the difference between the primary obligation and the subsidiary proviso, intended to secure the due performance of the primary obligation or to fix the compensation payable on its breach. The other learned Judge, Abdur Rahim, J., though he differed from him on another point, not material now, did not express any dissent on this question; on the other hand he was a party to the decision in *Venkataramiah Pillai* v. *Subramania Pillai* [2], already referred to. Neither the decision of the full Bench of this Court in *A. Muthukrishna Aiyar* v. *Sankaralingam Pillai* [4], nor the Judgment of Sadasiva Aiyar, J., in the order of reference, lends any support to the respondent; on the other hand the definition of 'penalty' given by Sadasiva Aiyar, J., at page 238 of the report is against the contention. Though references to the Money Lenders Act and to the decisions of the House of Lords especially

1. (1902) I. L. R. 26 M. 111. 2. (1916) 37 I. C. 799. 3. (1916) 35 I. C. 111.
4. (1912) I. L. R. 36 M. 229=24 M. L. J. 13?.

Samuel v. *Newbould*[1] decided on the statute are made, it is nowhere stated that the Indian Courts have under S. 74 of the Contract Act, the powers conferred on the English Court by the Money Lenders Act. There are however some cases recently decided by the Calcutta High Court which appear to lend support to the argument of the respondent. The first of these cases is *Bouwang Rajah Challaphroo Chowdhury* v. *Banga Behari Sen* [2], in which a person borrowed Rs. 400 and agreed to pay it with interest at 4 per cent. per mensem with six monthly rests. When the suit was brought nearly 16 years after, the amount due under the bond came to over Rs. 3,75,000, though the plaintiff claimed only Rs. 3,000 as there was no means of recovering the balance. The learned Judges reopened the contract and reduced the rate of interest. No particular section of the Contract Act is referred to and it may be that they set aside the contract as being induced by undue influence within the meaning of S. 16; for as pointed out in *Muthukrishna Aiyar* v. *Sankaralingam Pillai* [3] a grossly extravagant rate of interest may itself be evidence of undue influence and slight circumstances of inequality between the parties may be enough to bring the case under S. 16 of the Act. It must however be conceded that Mookerjee, J., delivering the judgment of the Court referred to the rate of interest as penal and cited cases where relief was given on the ground of undue influence and also cases in which relief was given on the ground of penalty. The same remarks apply to *Gopeswar Saha* v. *Jadav Chandra* [4]. In the latest case in that court *Krishna Charan Barman* v. *Sanat Kumar Das* [5] the learned Chief Justice of Bengal and Mookerjee, J., expressly lay down that a primary stipulation to pay interest may be a penalty and that learned Judge Mookerjee, J., states that the previous decisions above referred to were also decided on the ground that the stipulations for interest were in the nature of penalty. With all respect to the learned Judges we are unable to accept the position as sound. It must be remembered that S. 74 does not deal exclusively or primarily with money-lending contracts. If this decision is sound, courts would have power as already said to relieve a person from the performance of his contract whenever the court thinks the contract harsh in the circumstances of the case. No authority is cited, except the two cases already referred to, in

1. (1906) L. R. A. C 461.
2. (1915) 22 C. L. J. 311 : 20 C. W. N. 408.
3. (1912) I. L. R. 36 M. 229.
4. (1916) I. L. R. 43 C. 632.
5. (1916) I. L. R. 44 C. 162.

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support of such a proposition. Even the Money Lenders Act in England does not appear to give the English Court such a power in money lending contracts and we know of no authority which supports such a definiton of penalty as regards other species of contracts. Mr. Krishnamachariar argued that in a contract of loan, the promise to pay interest must be deemed to be compensation for breach of the promise to repay the principal and an excessive rate of interest must therefore be viewed as a penalty and contended that the Calcutta decision was based on the same principle. This argument ignores the distinction between compensation for the loan and compensation for breach of the promise to repay the amount of the loan with interest. The loan made by the lender is the consideration for the promise of the borrower to repay the amount of loan with the addition of another sum as interest for allowing the debtor to have the use of the money, i. e., compensation for the money lent; but the interest is not compensation for the breach of the promise; for the promise is to pay the principal and interest. If the promise is to pay a certain sum on a particular day and in default of payment on that day to pay interest, then the agreement to pay interest may be a stipulation by way of penalty; that was the decision of the Full Bench of this Court in *Muthukrishna Aiyar* v. *Sankaralingam Pillai*[1]. This last decision of the Calcutta High Court appears to us to be not only contrary to the decisions of this Court, but would also appear to be contrary to the observations of Lord Davey already referred to.

It was then argued that as the promissory note in this case was payable on demand, the contract was broken immediately the note was made and the interest claimed may be treated as penalty for non-performance of the contract. This is ingenious but unsound; for the contract or promise is to pay the principal with interest at a specified rate so long as the loan is not repaid, and it would be introducing a fiction contrary to fact to split this single promise into two separate engagements.

We think that the Subordinate Judge was wrong in giving relief merely on the ground that the interest appears excessive. We have however read the statement filed by the defendant and it is possible to read it as raising a plea of undue influence and it may be that no evidence was let in to prove those allegations

1. (1912) I L R. 35 M. 229 : 24 M. L. J. 135 (F.

because the learned Judge in the court below was prepared to give relief without such proof. We therefore reverse his decree and remand the suit for fresh trial. Costs to abide and follow the result.

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A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Kandasami Naicker ... *Appellant* (1st Defendant).*

v.

Irusappa Naicker and others ... *Respondent (Plaintiff and Defendants 2 and 3).*

Kandasami Naicker v. Irusappa Naicker

Limitation Act Ss. 6, 7 and 28, Art. 44 and 144—Guardian and ward—Alienation by guardian—Suit for possession by ward on attaining majority—Limitation —Bar against elder brother, when affects others—Limitation Act, S. 7, Scope of.

Plaintiff sued in ejectment basing his title on a sale-deed of 1893 executed to him by the mother of defendants 2 and 3, but as guardian of the second defendant alone, the third defendant (the posthumous son of his father) not having been then born. The plaintiff was in possession till 1909 when he was ejected forcibly by the first defendant who had obtained a sale-deed from the second defendant in 1908. This latter sale-deed was executed by the second defendant for himself and also for the third defendant who was then a minor. The second defendant attained majority in 1903, and the third, about the end of 1911 or beginning of 1912. The suit was brought in July 1912.

Held, that the second defendant's right to institute a suit for setting aside the sale of 1893 and for recovery of possession of the property from the plaintiff became barred in 1906 under Art. 44, that thereupon his title to such property became extinguished under S. 28 of the Limitation Act and the plaintiff having become the owner of the second defendant's interest in the property in 1906 was entitled to a decree for possession of such interest.

Madugala Latchiah v. *Pally Mukkalinga* [1], followed.

Held further, that the plaintiff's suit as regards the share of the third defendant must be dismissed. As the sale-deed of 1893 did not affect the interest of the third defendant he was not bound to have it set aside under Art. 44, and as against him, plaintiff could only rely on Art. 144, subject however to S. 6 of the Limitation Act.

Per *Sadasiva Aiyar, J.* The mere fact that under O. 1, R. 1 C. P. Code, the second defendant suing for himself and praying for one particular remedy could have joined in that same suit another cause of action vesting in the third defendant for whom he could have acted as next friend would not bring such a suit within the ambit of S. 7 of the Limitation Act, which contemplates the existence of a joint right and a joint cause of action in support of a single suit.

* S. A. No. 954 of 1915. 23rd January, 1917.

1. (1907) I. L. R. 30 M. 393=17 M. L. J. 220.

Kandasami Naicker v. Irusappa Naicker.

Second appeal against the decree of the District Court of Chingleput in A. S. No. 269 of 1914 preferred against the decree of the Court of the Additional District Munsiff of Chingleput in O. S. No. 317 of 1913.

C. V. Ananthakrishna Aiyar and P. S. Narayanaswami Aiyar for the Appellant.

K. Bhashyam Aiyangar for the Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.*:—The first defendant is the appellant. The plaintiff sued in ejectment basing his title on a sale-deed of 1893 (Exhibit A) executed to him by the mother of the defendants Nos. 2 and 3. The plaintiff was in possession till 1909 when he was ejected forcibly by the first defendant who had obtained a sale-deed from the 2nd defendant in 1908 (Exhibit II). The sale-deed (Exhibit II) was executed by the second defendant for himself and also for the 3rd defendant who was then a minor. The second defendant attained majority in 1903, while the third defendant attained majority about the end of 1911 or the beginning of 1912. The suit was brought in July 1912.

The sale-deed by the mother of the defendants 2 and 3 to the plaintiff was executed by her as guardian of the 2nd defendant alone, the 3rd defendant (the posthumas son of his father) not having been born then. The statement of the District Judge in paragraph 2 of his judgment that the plaintiff's sale-deed was executed by the mother of the defendants Nos. 2 and 3 *acting as the guardian of both* is clearly an error.

Both the lower courts have found that the sale deed of 1893 in favour of the plaintiff was executed for no consideration and that the minor 2nd defendant as whose guardian his mother executed it got no benefit under it. The District Munsif dismissed the plaintiff's suit.

On appeal the learned District Judge has given a decree in plaintiff's favour on the following reasoning, as I understand his judgment :—(a) The second defendant did not sue to set aside his mother's sale-deed of 1893 within 3 years of his attaining majority. (The said 3 years expired in 1906). Both the defendants 2 and 3 ought to have sued to set aside such sale within 1906. As they did not do so, they are barred under Art. 44 of the Limitation Act from questioning the sale. (b) Even if Article 44

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did not apply, Art. 144 would have applied to a hypothetical suit for possession if it had been brought by the defendants 2 and 3 just before the plaintiff was forcibly dispossessed in 1909. Such a suit would have been dismissed as barred, as at that time the plaintiff had been in possession for 16 years. (The District Judge gives the figure 18). Hence the plaintiff had obtained title by adverse possession against the defendants 2 and 3 on the date when he was dispossessed in 1909. The plaintiff basing his right on his title so perfected by adverse possession is entitled to sue in ejectment the 1st defendant who claims from the defendant Nos. 2 and 3.

Mr. Ananthakrishna Aiyar, the appellant's learned Vakil, argued as follows :—

(*a*) That even though a suit by a ward who has attained majority to set aside his guardian's alienation may be barred under Art. 44, he can avoid it as defendant by denouncing it in the suit for possession brought by the alienee.

(*b*) That the Lower Appellate Court was wrong in holding that the plaintiff was in adverse possession of the land as against the defendants Nos. 2 and 3 between 1893 and 1909, as his possession between 1893 and 1903 at least (when the 2nd defendant attained majority) must have been as agent of the defendants 2 and 3.

(*c*) That the sale-deed of 1893 was executed by the mother, not as guardian of both the defendants 2 and 3 as mistakenly supposed by the Lower Appellate Court, but as guardian of the 2nd defendant alone. The 3rd defendant was therefore not bound to have it set aside so far as his interest in the property is concerned. The plaintiff also could not have acquired the 3rd defendant's undivided interest by adverse possession as the third defendant had three years from his attaining majority (that is, till the end of 1914) to sue to recover possession of his interest and as the 1st defendant had recovered possession in 1909 itself of 3rd defendant's said interests before the 3rd defendant's right to recover possession from plaintiff had become barred.

It is clear from *Madugula Latchiah* v. *Rolly Mukkalinga* [1], that the sale deed executed by a guardian ought to be set aside by a ward by instituting a suit within the period mentioned in Article 44 and that till it is so set aside, the title vests in the alienee. It is also established by that decision that, though Article 44

1. (1907) I. L. R. 30 M. 393=17 M. L. J. 220.

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describes the suit to be brought by the ward as a suit merely to set aside the transfer of his property by his guardian, if the transferee has obtained and is in possession and the ward has therefore to add a prayer for the relief of possession, Article 44 alone still applies to the suit though brought for both the reliefs. Section 28 of the Limitation Act says that at the determination of the period limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. As the second defendant's right to institute a suit under Article 44 for setting aside the sale of 1893 and for possession of the property from the plaintiff became barred in 1906, his right to such property became extinguished under Section 28 of the Limitation Act and the plaintiff became the owner of the second defendant's interest in the property in 1906. As he has brought the suit in 1912 and as his title to the defendant's interest of which he became the owner in 1906 subsisted at the date of the suit, his claim for possession of such interest has to be decreed. I must therefore reject the contention (a) put forward by Mr. Ananthakrishna Aiyar.

Coming to his contention (b), I am unable to accept Mr. Ananthakrishna Aiyar's argument that the agency power given to the plaintiff by the 2nd defendant's mother under Exhibit I, was a general power-of-attorney which made him the 2nd defendant's agent as regards the management of the plaint property also, which had been alienated by the 2nd defendant's mother on the day previous to the execution of the agency deed. It seems to me clear that the plaint property was excluded from the agency and I am unable to differ from the finding of fact arrived at by the lower Appellate Court that the plaintiff's possession between 1893 and 1909 was adverse to the defendants 2 and 3.

Coming to the last contention (c), it is clear from the wording of Exhibit A that the sale deed was executed by the 2nd defendant's mother as guardian of the 2nd defendant alone. Plaintiff-respondent's learned Vakil asked us to presume in the plaintiff's favour that the 2nd defendant's mother intended to execute it in the exercise of all the powers to alienate which she possessed though she may not have known that she had the power to execute it also as guardian of the child then in her womb. I do not think that a court is bound to stretch any point in favour of a person like the

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plaintiff who took advantage of the helplessness of his mother-in-aw (2nd and 3rd defendants' mother) to obtain a sale-deed without consideration in fraud of his brother-in-law from her. The sale-deed, therefore, did not affect the 3rd defendant's undivided interest in the plaint properties. He was hence not bound to have it set aside under Article 44. As against his interest, the plaintiff could rely only upon adverse possession under Article 144. But as Article 144 read with Ss. 6 and 28 of the Limitation Act did not bar the 3rd defendant's rights or confer title on the plaintiff as regards 3rd defendant's rights before the plaintiff was dispossessed in 1909, the plaintiff cannot claim any title to the 3rd defendant's interest in the properties. (It is unnecessary to consider whether the 3rd defendant's interest has passed to the 1st defendant in this case owing to the sale-deed executed by the 2nd defendant in the 1st defendant's favour in 1908). The contention (*c*) has therefore to be upheld.

Mr. K. Bashyam Iyengar next contends for the plaintiff, that as the 2nd defendant could have when suing on his own behalf (in the suit governed by Article 44) to set aside the sale by his mother of his undivided interest also, joined in that suit a cause of action as the next friend of the 3rd defendant (or as managing member of the undivided family consisting of himself and the 3rd defendant) to recover possession of the 3rd defendant's interests also in that same suit, the principle of the Full Bench decision in *Doraisami Sirumadan* v. *Nondisami Saluvan* [1], applied and that therefore, the 3rd defendant has also become barred in 1906 from claiming title to his undivided share. I think that that decision gave as wide an effect to S. 8 of Act XV of 1877 (corresponding to S. 7 of the present Act) as possible and that it is wholly undesirable to extend the scope of that Section further. Where two brothers have got the same cause of action (that is, where all the material allegations giving rise to a right of suit are the same), where the whole right litigated and the nature of the entire claim litigated are the same and where under such circumstances the elder brother could institute a suit for himself and his younger brothers on that joint right and joint cause of action, S. 7 would become applicable according to the Full Bench decision and would bar the younger brother's right when the elder brother's become barred. But in this case the

1 (1912) I. L. R. 38 M. 118=25 M. L. J. 405.

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2nd defendant's cause of action and his right to bring a suit depends upon the fact of his mother's execution of Exhibit A, and a suit on such right of his is governed by Article 44 whereas the 3rd defendant's right of suit has nothing to do with Exhibit A or with Article 44 and his right would have been governed by Article 144. The mere fact that under Order 1, Rule 1 Civil Procedure Code, the 2nd defendant suing for himself and praying for one particular remedy could have joined in that same suit another cause of action vesting in the 3rd defendant for whom he (2nd defendant) could have acted as next friend, will not bring such a suit within the ambit of S. 7 of the Limitation Act which contemplates the existence in two or more persons of a joint right and a joint or joint causes of action in support of a single suit.

In the result the Lower Appellate Court's decree will be modified and a preliminary decree for partition of the plaint properties into two equal shares will be passed. The plaintiff's right to recover from the 1st defendant mesne profits on the said half share from fasli 1319 is also declared. Final decree will be passed (after taking necessary steps contemplated by law) by the District Munsif as regards possession to plaintiff of the particular land which might fall to his half share in division and in respect of the sum due to him for value of mesne profits.

The plaintiff must pay the 1st defendant's costs on half the value of the plaintiff's claim throughout and bear his own costs. (The right to the other half share as between the defendants 1 and 3 is not decided in this suit.)

Spencer, J.

Spencer, J.:—The plaintiff obtained a sale-deed in respect of the suit properties in 1893 from the mother of defendants 2 and 3. In this document Exhibit A she described herself as the wife of her deceased husband and as the mother and protecting guardian of 2nd defendant. The statement of the District Judge that she acted as guardian of 2nd and 3rd defendants in this transaction is incorrect. In the plaint it was stated that she acted in the capacity of guardian of the 2nd defendant alone, and for the purpose of this second appeal it may be taken that the 3rd defendant was in his mother's womb on the date of sale.

Accepting the finding of the Judge that the possession by the plaintiff of the plaint lands which are not included in the lands entrusted under Exhibit I, to his management as an agent of the family, was adverse, it is clear that unless the time be

extended under S. 6 of the Limitation Act, his title must have been perfected by prescription before the 1st defendant obtained a conveyance of them from the 2nd defendant in 1908.

The 2nd defendant being 8 years old in 1893 as stated in Ex. A must have attained his majority in 1902, or at least by 1903.

His title to his share of the ancestral property alienated became extinguished in 1906, when for 3 years after attaining majority he failed to set aside the transfer made by his guardian during his minority (Vide S. 6 and 21 of the Limitation Act), and therefore he had no interest of his own to convey to his transferee (1st defendant) in 1908 when he executed Exhibit II on behalf of himself and his minor brother.

But in 1893 there was not any alienation of the 3rd defendant's share in the property of the Hindu joint family to which he belonged at his conception.

Both the lower courts have found that the sale in 1893, regarded as an alienation of ancestral property, was with consideration and for no justifiable necessity. Third defendant attained majority less than 3 years before the institution of this suit.

Hence the title of the 3rd defendant which was not alienated in 1893 and was kept alive by his legal disability up to the date of this suit (S. 6 of the Limitation Act) does not stand on the same footing with the title of the 2nd defendant which was alienated in 893 and became extinguished by limitation in 19 06.

The District Judge without making any distinction has treated the title of both these defendants as extinguished. It is now argued in support of his judgment that time should be calculated under S. 7 of the Limitation Act as running against both on the ground that they were jointly entitled to institute a suit to recover their property and that one could give a valid discharge without the concurrence of the other.

I consider that S.7 of the Limitation Act does not apply, to the circumstances of this case. Owing to their interests having become split up, 2nd and 3rd defendants were not joint in estate in respect of this particular property after the execution of Exhibit A.

The cause of action for 2nd defendant to set aside the alienation made by his guardian is not identical with the cause of

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action for the 3rd defendant or his representative in interest to obtain a partition of his share of family property upon a subsisting title from a third party who was in wrongful possession thereof. When the 2nd defendant attained majority he was not competent to give a lawful discharge of the 3rd defendants's claim under the circumstances found to have existed in this case.

Thus this case is distinguishable from the case of *Doraisami Sirumadan* v. *Nondisami Saluvan* [1]. I agree that the appellant is entitled to succeed in respect of 3rd defendant's undivided moiety of the suit property and that he must fail as regards the 2nd defendant's moiety and that costs should be awarded as stated in my learned brother's judgment:

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE KUMARASWAMI SASTRI.

Pandiyan Pillai ... *Appellant* 1st (Defendant).*

v.

K. V. Vellayappa Rowther and another ... *Respondents (Plaintiff and 2nd defendant).*

Pandiyan Pillai v. Vellayappa Rowther.

Transfer of Property Act, S. 98—Combination of simple and usufructuary mortgages—Condition that the mortgagee should hold the property as owner on non-payment within a certain time—Clog on the Equity of redemption—Possession originally under mortgage—Subsequent change of character of, by subsequent arrangement—Possession adverse-Claim petitioner acquiring property subsequent to attachment—Whether can be set up on suit to set aside order in the claim proceedings—Transfer of Property Act, S. 51—Improvements effected by claim petitioner—Provision should be made for in the decree.

Where a mortgage which is a combination of a simple and usufructuary mortgage contains a condition which converts it into a sale in case the amount due is not paid within a certain period, such a condition is a clog on the Equity of redemption and ought to be relieved against.

Srinivasa Aiyangar v. *Radhakrishna Pillai* [2], followed.

Where by reason of a subsequent arrangement, possession which originally commenced under a mortgage is continued in a different capacity, it would suffice to start adverse possession.

Where certain property is attached by the decree-holder as the property of the judgment-debtor and a third person whose title had not ripened into ownership by adverse possession on the date of the attachment preferred a claim which was

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*S A. No. 1224 of 1916. 4th April, 1917.

1. (1912) I. L. R. 38 M. 118=25 M. L. J. 405.
2. (1913) I. L. R. 38 M. 667=25 M. L. J. 47.

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allowed and the decree-holder institutes a suit under O. 21, R. 63, the claim petitioner is not entitled to resist the suit on the ground that his title has become perfected by his possession subsequent to the date of attachment.

The right restored to the parties is the right which they asked the Court to give a decision upon as on the date of the attachment.

Where in such a suit, it is decreed that the plaintiff is entitled to sell the property subject to the usufructuary mortgage in favour of the claim petitioner defendant, and the latter had effected some improvements honestly believing that he was absolutely entitled to the property, the decree should make it clear that the sale is subject to the value of improvements the value of which will have to be paid to the defendant before evicting him.

Second appeal against the decree of the District Court of Madura in A. S. No. 191 of 1915 preferred against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 41 of 1914.

M. D. Devadoss for Appellant.

A. Krishnaswami Aiyar for Respondent.

The court delivered the following

Judgment:—This is a suit for a declaration that the property in suit is liable to be attached in execution of a decree obtained by the plaintiff against the 2nd defendant. He mortgaged the property in 1894 to the 1st defendant. In 1901, the 2nd defendant transferred the patta to the 1st defendant. In October 1912, the plaintiff attached the property in execution of his decree. The 1st defendant preferred a claim which was allowed. Thereupon this suit was instituted. The District Judge differing from the Subordinate Judge held that the property is liable to be sold in execution subject to the 1st defendant's mortgage.

In the second appeal Mr. Devadoss's first contention was that the mortgage was an anomalous one, that the condition for converting it into an absolute sale after four years worked itself out, and that the 1st defendant became the absolute owner. We are unable to agree. The period of four years is fixed not as a term of the mortgage, but only as limiting the period of enjoyment in lieu of interest. The document is not capable of being construed as a usufructuary mortgage for a term as contended for by the learned counsel. We think that it is a combination of a usufructuary and of a simple mortgage and as such is covered by the exception mentioned in S. 98 of the Transfer of Property Act. In this view, the condition for converting the mortgage into a sale is a clog on the equity of redemption

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which should be relieved against. We hold following *Srinivasa Iyengar* v. *Radhakrishna Pillai* [1], that the mortgage was not converted into an absolute conveyance, but was liable to be redeemed.

The next contention was that the mortgagee acquired a title by prescription to the property. It is true that there was a transfer of patta in January 1901. We do not agree with the learned District Judge that the fact that the mortgagee's possession was not interrupted would make any difference. We held in *Muthukaruppan* v. *Muthu* [2], that possession continued in a different capacity would suffice to start adverse possession, although the original possession was not given up : and we dissented from the Calcutta view to the contrary. We adhere to that view. But the further question is that as admittedly on the date of the attachment by the plaintiff, the 1st defendant had not perfected his prescriptive title, whether he is entitled to say that on the date of the suit he had acquired that title, and that consequently the plaintiff is not entitled to any relief in the suit. An old decision of this court not reported in the authorised reports namely, *Seetharama Reddi* v. *Venkata Reddi* [3], supports Mr. Devadoss. On the other hand, in *Krishnappa Chetty* v. *Abdul Khadir Sahib* [4], it was held by a Bench of this Court that from the date of the claim to the date of the final disposal of the suit, the property is subject to *lis pendens*. In the present case, it is not necessary to take up this extreme position. We understand that this view has recently been questioned by another Bench of this Court. *Vasudeo Atmaram Joshi* v. *Eknath Balakrishna Thite* [5], holds that if the title to the property was not perfected on the date of the attachment, the decree-holder can get a decree for attaching it. In our opinion, the proper view to take of the proceedings is this. On the date when the title of the party in possession was still inchoate, the plaintiff chose to invoke the aid of the court to protect the property from attachment. He got no relief in the summary proceedings. He thereupon sought the intervention of the court to establish his title. Consequently he is bound by the decision given against him. It is well established that a decision in a regular suit instituted to contest the order in

1. (1913) I. L. R. 38 M. 667.
2. (1914) I. L. R. 33 M. 1158.
3. (1901) 11 M. L. J. 344.
4. (1913) I. L. R. 38 M. 535.
5. (1910) I. L. R. 35 B. 79.

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the claim proceedings places the parties in *status quo ante* either by vacating the order made in the said proceedings or by confirming it. The result is the plaintiff is directed not to interpose obstacles in carrying out the further steps necessary to reap the fruits of the attachment. Both the parties are bound by that pronouncement. Consequently no question of interruption of possession or of its continuance despite the attachment arises. This conclusion is in consonance with the view taken by the Judicial Committee in *Phul Kumari* v. *Ghanshyam Misra* [1], as regards the nature of the right litigated after the order on the claim petition. In our opinion, the right restored to the parties is the right which they asked the court to give a decision upon, as on the date of the attachment. It is not necessary to say what might have been the result, in case the person in possession had not sought the aid of the court and if execution proceedings went on without his intervention. We think the plaintiff has a right to attach the property.

The last question relates to improvements. We are not determining their value. But as the decree of the District Judge says that the plaintiff should sell the property subject only to the mortgage, it is necessary to point out that the sale should be subject to the value of the improvements, if any, as well. No doubt it is only when the 1st defendant is evicted that he can claim to be paid their value; but none the less, the decree should make it clear that the sale is subject to the value of improvements and that the 1st defendant is entitled to be paid their value before eviction.

We feel no doubt that the 1st defendant was a *bona fide transferee.* We think that all that the courts should require of him is proof that he made the improvements honestly believing that he was the owner of the property. See *Nanjappa Gounden* v. *Peruma Goundan* [2] *Narayana Aiyar* v. *Sankaranarayana Aiyar* [3], *Municipal Corporation of Bombay* v. *The Secretary State for India* [4], and *Moitheensa Rowthan* v. *Apsa Bivi* [5]. The principle of S. 51 of the Transfer of Property Act is applicable to this case. See also *Henderson* v. *Astwood* [6]. Mr. Krishnaswami Aiyar, vakil for the respondent contended that as the document is

1. (1907) I. L. R. 35 C. 202.
2. (1909) I. L. R. 32 M. 530.
3. (1914) 1 L. W. 869.
4. (1904) I. L. R. 29 B. 580.
5. (1911) I L. R. 36 M. 194.
6. (1894) L. R. A. C. 150.

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incapable of conferring title as owner, there can be no question of *bona fides* in making improvements. If the transferee acted recklessly and in utter disregard of obvious facts, he could not be said to be acting *bona fide*. That was all that was laid down in *Maddusami Siddappa* v. *Bhaskara Lakshmi Narasappa* [1]. In the present case, the form of the document and the conduct of the mortgagor and of the mortgagee show that the 1st defendant honestly believed himself to be the owner of the property.

The decree of the District Judge must be modified so as to inclue the declarations we have indicated. The appeal fails in other respects. Each party will bear his own costs in this court. The order as to the costs of the lower court will stand.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. [FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, *Chief Justice*, MR. JUSTICE ABDUR RAHIM, MR. JUSTICE COUTTS TROTTER, MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE SRINIVASA AIYANGAR.

Mulla Vittil Seeti Kutti and others. — *Appellants* (Defendants 5 and 8 and legal representatives of the 8th defendant).*

v.

K. M. K. Kunhi Pathumma and others. — *Respondents. (Plaintiff and defendants 11 to 13).*

F. B.

Mulla Vittil Seeti Kutti v. Kunhi Pathumma.

Limitation Act, Art. 134—Applicability—Transfer under which possession not taken by transferee—Suit by mortgagor or cestuique trust to recover property from—Limitation—Starting point, date of transfer or date on which possession is taken by transferee—Object of Article—Interpretation of articles of Limitation Act based on circumstance of their being printed in separate columns—Permissibility—Periods of suspension when can be allowed under Act—Residuary articles—Function of—Statute—Interpretation—Hardship—Considerations of—Propriety.

Held, by *Abdur Rahim, Seshagiri Aiyar and Srinivasa Aiyangar, JJ.* (*The Chief Justice and Coutts Trotter, J.*, dissenting): Art. 134 of the Limitation Act is inapplicable to a transfer from a trustee or mortgagee under which possession is not taken by the transferee.

Held, by *The Chief Justice, Coutts Trotter and Srinivasa Aiyangar, JJ.*, (*Abdur Rahim and Seshagiri Aiyar, JJ.*, dissenting): In the view that art. 134 is applicable to a transfer under which possession is not taken by the transferee at the time of the transfer, the starting point of limitation is the date of the transfer and not the date when possession is taken by the transferee.

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* S. A. No. 2558 of 1912. 23rd April, 1917.

1. (1916) 29 M. L. J. 357.

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Per The Chief Justice :—The intention of the legislature in Art. 134 was not to make a provision in favour of the cestui que trust or mortgagor and give him a further period than he would otherwise have had ; on the contrary, the intention was clearly restrictive.

No argument can be founded on the fact that the articles of the Limitation Act are printed in three columns.

Under the Indian Limitation Act Courts are not at liberty to allow periods of suspension not provided for therein. It is equally inadmissible under the Act to say that time shall not begin to run from the time limited in the article except under some express provision of the Act.

Per Abdur Rahim and Seshagiri Aiyar, JJ, :—It is a well-known rule for construing the Indian Statute of Limitation that the first and the third columns must be read together and that the words appearing in one of the columns should be given the same meaning as in the other columns.

Per Seshagiri Aiyar, J. :—Art 134 is in the nature of an exception to art. 148 which provides for ordinary cases of redemption and its object is to afford protection to the person in possession. The article should therefore be construed liberally in favour of the legal owner and strictly against the transferee. Wherever both the 1st and 3rd columns of an article of the Limitation Act are not applicable to a case, the residuary articles must be applied. The function of the residuary articles is to provide for cases which could not be covered by the exact words used in both the columns of an article.

Per Srinivasa Aiyangar, J. :—In construing the articles of the Limitation Act undue stress ought not to be laid on the first column of the article which describes the nature of the suits and it ought not to be held that all suits of that class must be governed by that article, though the starting point fixed in the third column cannot be applied at all or cannot be applied without working injustice.

Per Coutts Trotter and Srinivasa Aiyangar, JJ. :—Hardship or no hardship if the language of a statute is plain, Courts are not entitled to take liberties with it under the guise of construing it.

Second Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 531 of 1911 preferred against the decree of the Court of the District Munsiff of Parapanangadi in Original Suit No. 632 of 1909.

The Court (Ayling and Tyabji, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH*:—

Tyabji, J.

Tyabji, J. :—The facts and questions involved in this appeal may be very shortly stated.

When I refer to the parties I include their predecessors in title. All the mortgages mentioned below are usufructuary.

In 1862 the plaintiff mortgaged items II and III for Rs. 1,000 to defendants 1—4 (Exhibit A); defendants 1—4 took possession.

In 1886 defendant 1—4 purported to mortgage item II for Rs. 125 in favour of one Haji (Exhibit XV,) who was subsequently redeemed by defendants 5 and 8.

* 21st September 1915.

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Tyabji, J.

In 1893 defendants 1—4 purported to mortgage item III to 13th defendant for Rs. 75 (Exhibit XXVI).

In 1894 defendants 1—4 purported to mortgage items II and III to defendants 5 and 8 for Rs. 9,000 (Exhibit XVIII). Possession of item II was taken by defendants 5 and 8 in 1900 (Exhibit XX); possession of item III has been taken after the suit was instituted.

Defendants 1—4 on each of the occasions when they purported to mortgage the properties purported to mortgage them as if they were full owners, and not merely as mortgagees.

The plaintiff has sued to redeem his original mortgage of 1862 Exhibit A and the contention of defendants 5 and 8 is that as their transfer from the mortgagees was more than 12 years prior to the suit the original mortgagor is barred from suing for possession without redeeming them; article 134 of the Indian Limitation Act. Both the lower Courts have held (on the authority of *Ramachandra v. Sheikh Mohidin* [1]) that the title of defendants 5 and 8 could become indefeasible only 12 years after possession and as defendants 5 and 8 have not had possession for the said period prior to suit the claim has not become perfected by adverse possession.

It is argued before us that *Ramachandra* v. *Sheikh Mohidin* [1]. was wrongly decided and that on the wording of the article no question as to possession arises.

The article provides that:

a suit to recover possession of immoveable property,

(1) conveyed or bequeathed in trust, or

(2) mortgaged;

and afterwards transferred from the trustee or mortagee for valuable consideration—shall be barred after 12 years from the date of the transfer.

The difficulties in reading the article as contended for by the appellant are two fold. In the first place in accordance with it, a suit for possession may be barred though the defendants may not have taken possession and consequently there may have never accrued a cause of action against him for obtaining possession. This is not a mere academic difficulty. In regard to the 3rd item

1. (1899) I. L. R. 23 B. 614.

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of property the difficulty arises in this very appeal: for it is contended that in regard to that property the present suit could not lie against the 5th and 8th defendants as they were not in possession at the date of the suit; they have taken possession since the suit was instituted and if now a fresh suit were instituted against them the defence would be that the suit is barred under article 134 as the suit would be 12 years after the transfer.

Thus according to the appellant's contention a mortgagee can transfer not merely his own rights but the rights of the mortgagor, and can pass a better title than he himself possesses by the simple device of deferring possession to the transferee for 12 years and the mortgagor can do nothing to prevent this being done. Secondly, if the article is read as the appellant contends then though the transfer by the mortgagee may be only of a limited interest and of an interest which does not carry with it the right of possession, still the real owner of the property would be unable to obtain possession after 12 years of the transfer: so that not only is the mortgagee (a person not entitled to full ownership) enabled to transfer full ownership, but the full ownership is acquired by the transferree whether it is purported to be transferred or not. That the article should not be read literally on this 2nd point was decided in *Radhanath Doss* v. *Gisborne* [1].

The difficulty on the other hand in reading the article as read in *Ramachandra* v. *Sheikh Mohidin* [2], is that the words in the 3rd column of the article are "from the date of the transfer" and not "from the date of possession."

It seems to me that *Ramachandra* v. *Sheikh Mohidin* [2], can be supported on the basis (1) that the law of limitation implies that the suit in question could have been instituted during the period allowed or as expressed in *Peria Aiya Ambalam* v. *Shunmuga Sundaram* [3], "limitation cannot run against him when there is no remedy open to him to recover possession of his property" and (2) that the transfer referred to in the first column of the article must by necessary implication be a transfer which gives the right to possession and which is not complete unless possession is actually transferred. I do not express any opinion on the question whether the article can be so restricted beyond referring to the remarks of Lord Cairns in *Radanath Doss* v. *Gisborne* [1], approved

1. (1871) 14 M. I. A. 1=15 W. R. 24. 2. (1899) I. L. R 23 B. 614.
3. (1913) 26 M. L. J. 140 at p. 146.

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in *Juggernath Sahoo* v. *Syud Shah Mahomed Hossein* 1, to the effect that the article must be stringently read.

Ramachandra v. *Sheik Mohidin* 2, gave effect to a previous decision of the Bombay High Court in which Farran, C. J., delivering the judgment of himself and Fulton, J., said that until the defendants held possession under their mortgagee for the full period of 12 years the plaintiff could have disregarded it and recovered possession and that it was only after the defendants had held possession for 12 years that article 134 coupled with S. 28 of the Indian Limitation Act gave legal validity to their mortgage barring the plaintiff from recovering possession without redeeming them.

It has been argued before us that the reference to possession was merely obiter. But it seems to me to be more likely that a Judge of so much experience as Sir Charles Farran had in mind the second of the two difficulties which I have mentioned: unless the transfer by the mortgagee was one which entitled the transferee to possession it is difficult to give any effect to the article; and if that concession has to be made the step taken in *Ramachandra* v. *Sheik Mohidin* 2, seems justifiable.

There are however some other cases both of this and the other High Courts which make it desirable in my opinion that the matter should be settled by a Full Bench of this Court. The point that was referred in *Manavikraman Ettan Thamburan* v. *Ammu* 3 to the Full Bench was whether a person who had taken a sub-mortgage could be said to have "purchased" within the terms of the article of the Act of 1877: it was no doubt assumed that if he could be styled a purchaser the article applied: on the point referred the article has been amended and made quite clear. On the other hand in the analogous case, where a usufructuary mortgagee is ousted by a trespasser, a Full Bench of this court held on general principles and not on any express words in any article that limitation does not run against the mortgagor until there has been an assertion of adverse title to the knowledge of the mortgagor, *Peri Aiya Ambalam* v. *Shunmuga Sundram* 4. The same principles were again enunciated in elaborate Judgments of the Full Bench in *Vyapuri* v. *Sonamma Boi Ammani* 5. The question in the last case was whether the possession of a trespasser

1. (1874) L. R. 2 I. A. 48=23 W. R. 99. 2. (1889) I. L. R. 23 Bom. 614.
3. (1901) I. L. R 24 M. 471. 4. (1913) 26 M. L. J. 140 at p 146.
5. (1915) I. L. R. 39 M. 811 : 29 M. L. J. 645.

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who has dispossessd a simple mortgagor is adverse to the simple mortgagee. These decisions of the Full Bench are based on general principles which are applicable to the present case. unless it is held that the language of the article precludes any other construction but that which is put forward by the appellant.

I would therefore refer the following questions to the Full Bench.

(1) Does article 134 of the Indian Limitation Act apply to a transfer from the trustee or mortgagee under which possession is not taken by the transferee?

(2) Where possession is taken under the transfer but at some time after the date of the transaction purporting to transfer, the right to take possession, does time begin to run from the date when possession is taken or from the date of the transaction?

(3) Whether the mortgage is usufructuary and the mortgagor has no right to obtain possession from the mortgagee at the time of the transfer, does time run against the mortgagor under article 134,

(*a*) from the time of the transfer or

(*b*) from the time when the mortgagor's right to sue for possession accrues, under the original mortgage or

(*c*) from the time when the transferee enters into possession or

(*d*) from the time when the transferee enters into possession and asserts an adverse title to the knowledge of the mortgagee.

Some other questions were argued before us with which I shall now deal.

(1) With reference to the right of the appellant under Exhibits XV and XX and in regard to item III the opinion of the Full Bench must be awaited.

(2) The contention that the lower Courts erred in giving a decree for purapad for more than 3 or 6 years prior to suit, is opposed to *Parasurama Pattar* v. *Venkatachalam Pattar* [1], where it was laid down that purapad is one of those payments which the mortgagee has to make under the mortgage and that the mortgagor need not sue for it until he sues for redemption at which time the mortgagee is bound to give credit to the mortgagor for all payments that the mortgagee was bound to make. I would follow that decision; and the only other point then is (3)

1. (1913) 25 M. L. J. 561.

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Tyabji, J.

Whether the appellants should have been made liable for purapad only from 1894 the date of the assignment of the mortgage to them. But the appellants by the assignment could not get higher rights than the original mortgagee their assignor, who as I have already held was bound to give credit to the mortgagors for the payments due from himself. This contention therefore cannot be accepted.

The question whether the appellant has under article 134 acquired an indefeasible right as mortgagee of item II for Rs. 125 (Exhibit XV) may in some of its aspects depend upon the decision of the Full Bench. This point will therefore be dealt with when the case comes back for final decision.

Ayling, J.

Ayling, J.:—I agree to the reference proposed: and also in the conclusions arrived at by my learned brother on the other points argued before us.

K. P. M. Menon, counsel for Appellants 1 and 3 to 7.

A. Sundram, counsel for 1st Respondent.

The Court expressed the following

Wallis, C. J.

Opinion:—*The Chief Justice*:—Our rules only provide for a reference to a Full Bench where both the learned Judges constituting the Bench agree that the question of law to be referred is involved in the determination of the case. There are weighty and obvious reasons for this limitation, and it is therefore desirable that we should confine ourselves to the questions which actually arise in the present case. The suit is to redeem a mortgage of the year 1862 and is within time as against the mortgagees, having been brought within sixty years from the date of the mortgage, Art. 148. The question is whether it is also within time as against transferees from the mortgagees, or is barred under Art. 134 as having been brought more than twelve years from the date of the transfer. The plaintiff's mortgagees acting as full owners executed several usufructuary mortgages of items 2 and 3 under which they have been out of possession of these items since 1862 and 1894 respectively. The most recent mortgages of both these items were more than twelve years before suit, but the present mortgagees did not get possession under these mortgages from the prior mortgagees as regards item 2 until 1900 and as regards item 3 until after the institution of the present suit.

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As regards both items the suit is covered by the language of Art. 134 taken in its natural sense, but it is said that, as the plaintiff had no occasion to sue the present transferees by way of mortgage from the original mortgagees until they took possession as regards item 2 in 1900 and as regards item 3 after the institution of this suit, the article does not apply. With regard to the last case it must be remembered that possession was not with the mortgagees but with prior transferees from them, so that for over thirty years the mortgagors if they wished to recover possession of the suit properties would have had to sue transferees from the mortgagees.

This result, it is said, may be arrived at in three ways:—(1) by reading the date of transfer in the third part of the article as meaning transfer with possession, (2) by holding that the article only applies to cases where possession is given on the date of the transfer and (3) by holding that time did not run under the article until the transferees from the mortgagees took possession. In my opinion none of these solutions is admissible. Article 134, as is well known, is founded on S. 25 of the Real Property Limitation Act 1834 which, after providing generally in S. 24 that suits in equity should be barred in the same way as actions at law, went on to provide in S. 25 that when land is vested in a trustee the right of the *cestui que trust* to bring an action for the recovery of the land shall be deemed to have first accrued when the land shall have been conveyed to a purchaser for valuable consideration and shall be deemed to have accrued only as against such purchaser and any person claiming through him. This was an exception in favour of the *cestui que trust*, as it prevented time running against him until there had been a conveyance by the trustees to a purchaser for valuable consideration. Now, as to the first suggestion, it has never been doubted, so far as I know, that when the section applies, time begins to run from the date of the conveyance, and not from the date when possession is taken under the conveyance. The very object of the statute was to get rid of the question as to when possession became adverse, which was the starting point under the Act of James I as construed by the Courts, and to fix a definite period at which the right to re-enter or bring the action for recovery should be deemed to have accrued. To come now to the Indian enactments, there is in my opinion equally little ground for holding "the date of the purchase" in

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the corresponding S. 16 (V) of the Indian Limitation Act of 1859 and in Art. 134 of the Acts of 1871 and 1877 and "the date of transfer" in Art. 134 of the present Act mean transfer with possession. S. 16 (V) of the Act of 1859 was obviously taken from S. 25 of the English Act, but was made applicable to purchases from mortgagees as well as from trustees, and there is nothing in the extension to justify us in reading purchase, or now transfer, as purchase or transfer with possession. The word "purchase" was probably substituted for "conveyance" to cover oral sales, but there is no reason to suppose that it was intended to depart in other respects from the starting point provided in S. 25 of the English Act. To adopt this construction in my opinion is simply to alter the statutory starting point and to go back to the date of adverse possession which was the old law modified by the Act of 1834.

I feel no less difficulty in holding that the present article applies only where possession is taken on the date of the transfer, as this is inserting words which are not there and would practically exclude nearly all the cases which would otherwise come within the article as possession is rarely taken by the transferee on the date of the transfer. Even supposing S. 25 of the English Act of 1834 to be susceptible of such a construction, I do not think that would affect the present question.

Mr. Lewin points out that a strict construction of S. 25 would bar reversionary heirs whose right to sue might not arise until long after the date of the conveyance, and he founds an argument on the fact that S. 25 is in form a proviso on S. 24 which imposes the same limitation upon suits in equity as upon actions at law, and a proviso the general effect of which is to extend rather than to limit the right of suit. As observed in Darby and Bosanquet, 2nd Edition, page 417, its effect is to prevent time running in favour of a trustee against a *cestui que trust* upon an express trust or those claiming through him until a conveyance for value has been made by such trustee or some one claiming through him and that the right of the *cestui que trust* is to be deemed to accrue at the date of such conveyance. 'Now it is obvious,' the learned authors remark "that *unless this is construed as only a proviso on the 24th section* (the italics are mine) it might, instead of extending the time wherein the *cestui que trust* might bring his remedy actually take it away before his

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right accrued." Accordingly they agree with Mr. Lewin that the section may be read as applicable only to cases where it extends, and not to cases where it restricts, the right of suit which the mortgagee might otherwise have. It cannot, I think, be said that this construction has ever been adopted in any decided case and Mr. Godefroi in his work on Trusts, 4th Edition, page 600, refers to it as probable but doubtful. On the other hand it would appear that in the cases to which the article has been held applicable the date of the conveyance has always been taken as the starting point. In *Attorney-General* v. *Flint* [1], one of the trustees of charitable land who was also the owner of adjoining lands incorporated a building standing on the charity land with a building standing on his own land and afterwards sold the whole building in 1817. A conveyance pursuant to the sale was executed by his executors some years later, and it was held that the suit was not barred as it was brought within twenty years from the date of the conveyance. In *Petre* v. *Petre* [2], it was held that there was no express trust to bring the case within S. 25 but that, even if there were, the suit was barred as having been brought more than twenty years after the date of a deed by the trustee conveying the property to the trustees of his marriage settlement. In a somewhat similar Irish case *Smith* v. *Smith* [3], the trustee was held to have conveyed the property to the trustees of his marriage under a settlement which was not forthcoming at the date of the suit and to have enjoyed it during his life-time, and it was held that a suit against his son who took under the settlement after his death was barred by S. 25. The decision was reversed on the ground that the terms of the settlement were not proved, *Smith* v. *Smith*, [4]; but it would appear from the observations of Darby and Bosanquet, page 444 that the appellate Court agreed with the lower Court that the suit would have been barred under S. 25 if the settlement had been proved. *Smith* v. *Smith* [4] only decides that there is no dispossession until some one else takes possession. In *St. Mary Magdalen, Oxford* v. *The Attorney-General*, [5] there is nothing in their Lordships' judgments to recognise the contention raised for the respondent, and assuming however that this is the correct construction of S. 25 of the English Act, S. 16 (V) of the Indian Act of 1859

1. (1844) 4 Hare 147=67 E. R. 597.
2. (1853) 1 Drew. 371=61 E. R. 493.
3. (1876) Ir. R. 10 Eq. 273.
4. (1876) I L. R. Ir. 206 C.A.
5. (1857) 6 H. L. C. 189=10 E R. 1267.

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was not appended as a proviso to any previous section but was wholly self-contained, and, in the language of their Lordships in *Lala Soni Ram* v. *Kanhaiya Lal* [1], as regards other articles of the English and Indian Statutes, I think that S .16 (V) of the Act of 1859 was essentially different in its language and intention from S. 25 of 3 and 4 Will 4, c. 27, and the same observation applies to Art. 134 of the present Act.

With reference to purchases from mortgagees S. 16 (V) of the Act of 1859 expressly provided that the period of limitation should be the same as in the case of suits against the mortgagee himself under S. 1 (15), but this provision, which would have met the present case, was not reproduced in Art. 134 of Act IX of 1871 which shows clearly the intention of the legislature to further restrict the time in the case of purchases from mortgagees. Article 134 of Act XV of 1877 omitted the words in "good faith" from the first part of the article, while the present Act of 1908 substituted the words transfer or purchase throughout the article with consequential variations. In these circumstances, it cannot, I think be held that the intention of the Indian legislature in this article was to make a provision in favour of the *cestui que trust* or mortgagor and give him a further period than he would otherwise have had. On the contrary, the intention was clearly restrictive, and it seems to me therefore that, even if the construction of S. 25 of the English Act suggested by Lewin and Darby and Bosanquet be accepted, that affords no warrant for introducing such a construction here. The Indian legislature, must have been perfectly well aware that in the case of sales and mortgages alike possession is rarely given on the date of the transfer; and, if it had intended the date of taking possession under the sale or mortgage to be the starting point, nothing would have been easier than to say so. It has not done so, and it is not open to us to effect this by taking out of the article nearly all the cases which would otherwise fall within it. The decision of the Privy Council in *Batul Begum* v. *Mansur Ali Khan* [2] is no authority for such a course. That was a suit for pre-emption as to which under Art. 10 the starting points are either taking physical possession or the registration of the instrument of sale. There had been no such registration, and the suit property which consisted of certain shares in an estate

1. (1913) L. R. 40 I. A. 74 at 84=25 M. L. J. 131.
2. (1901) L. R. 28 I. A. 248=I. L. R. 24 A. 17.

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did not admit of physical possession being taken except by means of a partition suit which had not been brought. Neither of the starting points prescribed under Art. 10 was to be found in the case, and in these circumstances their Lordships applied the residuary article. Here however we have the date of the instrument of transfer which is, as I read it, the prescribed starting point under Art. 134. All that was decided in *Rungiah Gounden & Co.* v. *Nanjappa Row*, [1] was that a decree directing the sale of mortgaged property in default of payment of the mortgaged debt on or before the date fixed in the decree was not a decree directing payment of the amount to be made at a certain date, within the meaning of Art. 179, column 3, paragraph 6 (which I should have thought it obviously was not) and that consequently the application did not come within the article and must be governed by Art. 178. This in my opinion is no authority for giving the go-by to the starting point prescribed in Art. 134 for this particular class of suits by refusing to apply the article to the bulk of the suits falling under it and treating them as governed by some other article. I may add that I do not think any argument can be founded on the fact that the articles are printed in three columns.

Taking this to be the article to be applicable and the starting point to be the date of the instrument of transfer we have next to consider whether there is any rule of construction under which time can be considered not to run until the transferee from the mortgagee gets into possession. In *Lala Soni Ram* v. *Kanhaiya Lal* [2], their Lordships laid down that that under the Indian Act, once time begins to run it could not be suspended except under the provision of the Act, and explained the decision in *Burrell* v. *The Earl of Egremont* [3] as proceeding on the construction of the peculiar language of S. 40 of the English statute, and I do not think their Lordships intended to depart from that principle in their recent decision affirming the decision in *Lakhan Chunder Sen* v. *Madhusudan Sen* [4] for the reasons given by the learned Judges of that Court. That decision can be supported on the ground that the case was covered by S. 14 liberally construed, and I do not think it is authority for the proposition that under our

1. (1903) I. L. R. 26 M. 780.
2. (1913) L. R. 40 I. A. 74 at 84=25 M. L. J. 131.
3. (1844) 7 Beav. 205.
4. (1907) I. L. R. 35 C. 209.

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Limitation Act we are at liberty to allow periods of suspension not provided for in the Act. That would be wholly opposed to the line of reasoning in *Lala Soni Ram* v. *Kanhaiya Lal* [1] as well as to recognised principles of statutory construction. It is I think equally inadmissible under the statute to say, not that the running of time shall be suspended, but that it shall not begin to run from the time limited in the article except under some express provision of the statute. See also the judgment of Neville, J., *In re Metropolis and Counties Permanent Investment Building Society, : Gatfield's case* [2]. For these reasons I am unable with great respect to follow the decision in *Ramachandra* v. *Sheikh Mohidin* [3] and the obiter dicta in *Husaini Khanam* v. *Husain Khan* [4].

Briefly my answer is that, when as here the case is covered by the language of the article, it is not permissible to depart from the article itself or from the starting point prescribed therein on grounds of real or fancied hardship. Darby and Bosanquet have a final chapter on the construction of statutes of limitation but they do not refer to any such propositions such as are now suggested. In my opinion they are destitute of authority and all the limitations which have been placed in modern times on the operation of the statutes of limitation have been based on a construction of the language of the particular sections and not on any such general principles. I may add that I see no great hardships in the present case. The mortgagees in this case had parted with possession to transferees more than thirty years before suit and had never retaken it, and the mortgagors might at any time have ascertained the extent of the incumbrances they had created by reference to the Registration Office of the District. My answer is that in this case the mortgagors are barred.

Abdur Rahim, J.

Abdur Rahim, J. :—The questions referred to the Full Bench relate to the construction of Art. 134 of the Limitation Act which has been the subject of much discussion. It is in these words:— "To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration; 12 years, (from) the date of transfer." The article embodies certain alterations of the similar provisions of the previous Limitation

1. (1913) L. R. 40 I. A. 74 at 84=25 M. L. J. 131.
2. (1911) L. R. 1 Ch. 698.
3. (1899) I. L R. 23 B. 614.
4. (1907) I. L.R. 29 A. 471 at 480.

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Acts. In the first place, it is meant to apply not merely to purchases but also to other transfers made by a trustee or a mortgagee. This alteration was due, apparently, to the doubts that arose as to whether the word "purchaser" covered the case of transferees like lessees and mortgagees. See *Manavikraman Ettan Thamburan* v. *Ammu* [1] and the dissentient judgment of Davies, J., and *Ram Kani Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bhadur* [2].

The main question raised by the reference depends in my opinion, on what kinds of transfer are referred to in the 'article' or in other words, whether the word 'transfer' means merely the execution of an instrument of transfer, such as a deed of sale, lease or mortgage, or the passing of property or of an interest in property along with possession. It is a well known rule for construing the Indian statute of Limitation that we must read the first and the third columns together. The first column of Art. 134 defines the scope of the article as applying to suits for the recovery of possession of immoveable property which has been 'transferred' by a trustee or a mortgagee; the date from which time is to be calculated is given as 'the date of the transfer'. Now, from the very moment of the transfer the transferee should be capable of being sued for recovery of possession and this implies that the transfer must be a transfer with possession. The result would be that unless the transferee has been in possession for 12 years the suit against him would not be barred under Art. 134. If the transferee did not obtain possession in pursuance of the transfer, Art. 134, in my opinion would not apply at all. Reading the article, therefore in that light, I agree in the decision in *Ramachandra* v. *Sheikh Mohidin* [3] and *Husaini Khanam* v. *Husain Khan* [4] although some parts of the reasoning in those cases might be open to criticism. This is also the view suggested in *Muthu* v. *Kambalinga* [5] which it may be mentioned was overruled on another point by the Full Bench in *Ahamed Kutti* v. *Raman Nambudri* [6] and in all the cases which have been brought to our notice bearing on the interpretation of Art. 134, the purchaser or other transferee who was held to be protected by this article had been in possession for 12 years. That also seems

1. (1901) I. L. R. 24 M. 471.
2. (1905) 2 C. L J. 546. etc.
3. (1899) I. L. R. 23 B. 614.
4. (1907) I. L. R. 29 A. 471.
5. (1889). I. L. R. 12 M. 316 at p. 318.
6. (1901) I. L. R. 25 M. 99.

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to be the effect of the English rulings as stated in Lewin on Trusts at p. 1125. "No possession by a purchaser for valuable consideration short of the statutory period will be a bar."

I should therefore answer the first question in the negative.

As regards the second question, I would answer it by saying that time will run from the date when the transfer is completed by the transferee being given possession.

The third question assumes the position that the mortgagor was not entitled to obtain possession from the mortgagee at the time of the transfer. It was strongly suggested in the course of the argument that in such a case Art. 134 will not apply and that time will not run at all until the mortgagor's right to obtain possession from the mortgagee has accrued. Article 134, as has been pointed out in more than one decision, does not apply to cases where a trustee or a mortgagee makes the transfer in pursuance of the power vested in them; in such cases the transferee becomes merely an assignee of the trust or mortgage and cannot claim any higher position (see *Vythilingam Pillai* v. *Kuthiravattah Nair* [1] and *Ram Kani Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur* [2]); it applies only to transfers made in excess of the transferor's powers. Now a mortgagee in possession is prohibited from doing any act which is destructive or permanently injurious to the property mortgaged (see S. 76 of the Transfer of Property Act.) If he therefore purports, for instance, to sell the property to a third person the mortgagor would be entitled, although the terms of the mortgage may not have expired to protect his own interests by a proper suit. If a transfer is only threatened he can obtain an injunction and if it has actually been made he can ask for possession to be delivered to the mortgagee. It is not however necessary to answer the third question.

Coutts Trotter, J.

Coutts-Trotter, J.:—With great respect to my brothers Abdur Rahim and Seshagiri Aiyar, JJ. and the learned Judges who decided *Ramachandra* v. *Sheikh Mohidin* [3], I am unable to construe 'transfer' as meaning 'transfer with possession,' because that is really what it comes to, that seems to me to amount to a bodily importation into the statute of words that are not there. But I am impressed with the argument that the third column of the

1. (1906) I. L. R. 29 M. 501. 2. (1905) 2 C. L. J. 546.
3. (1899 I. L. R. 23 B. 614.

schedule is meant to fix the time at which the plaintiff's cause of action is to be deemed to accrue. How can a cause of action be deemed to accrue at a time when circumstances precluded it from existing? It is very tempting to hold that the article cannot apply to a plaintiff whose cause of action did not exist at the time when limitation is said to begin to run. Such a general principle would be intelligible and very likely salutary; but I do not find it in the statute or in any decision that is binding upon this Court, and I do not see how I can import a general principle into a codifying statute. It is no doubt a startling result to say that a man's cause of action can be barred before it has accrued but if the plain words of the enactment involve that, we cannot rewrite it. I agree respectfully with my Lord that the words here are too plain to evade; and I question whether judicial attempts to mitigate the hardships of the obvious interpretation of statutes do not do more harm than good. If the words of the statute work injustice unless a violent strain is put upon them, the legislature alone can cure the evil.

My answer therefore to the first question is yes; to the second from the date of the transaction.

Seshagiri Aiyar J.

Seshagiri Aiyer, J. :—Although a large number of questions were submitted for the consideration of the Full Bench the arguments related only to two points : (*a*) whether the plaintiffs are bound to pay a sum of Rs. 9,000 to defendants 5 and 8 before redeeming the mortgage ; (*b*) whether they are bound to pay them a further sum of Rs. 125. The facts which raise these two questions are briefly these : The plaintiffs are the owners of the property. They mortgaged items 2 and 3 for Rs. 1,000 to defendants 1 to 4 in the year 1862. It was a usufructuary mortgage, and defendants 1 to 4 took possession under the mortgage. In the year 1882, these defendants notwithstanding they were only mortgagees dealt with the property as if they were full owners thereof and gave a mortgage of item 2 to one Poker; in 1886 one Haji redeemed Poker. The 5th defendant redeemed Haji and got possession in 1900. From the year 1886 to 1900 Haji held possession under a mortgage for Rs. 125. Consequently, he acquired a right to be redeemed on the payment of that amount. The 5th defendant who has stepped into the shoes of Haji is entitled to claim that right. Mr. Sundram who appeared for the plaintiff

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did not dispute the liability of his client to pay the sum of Rs. 125 before redemption. That disposes of the second question.

The first question is more difficult. It was only in the year 1900 that the 5th defendant got possession of the property, although the mortgage for Rs. 9,000 was in the year 1894. The suit for redemption was brought in the year 1909. If limitation commenced to run from 1894, the date of the mortgage, the plaintiff could not maintain the suit in its present form. If, on the other hand, limitation began to run only from 1900 when possession was obtained by the 5th defendant, the suit is in time. I have come to the conclusion that the suit is in time. In my opinion, clauses (1) and (3) of the schedules should be read together and the words appearing in one of the clauses should be given the same meaning as in the other clause. I also consider that the canon of construction suggested by Benson and Bhashyam Aiyangar, JJ. in *Rungiah Gounden & Co.* v. *Nanjappa Row* 1, namely, "if the various starting points fixed in the third column of any article from which the period of limitation is to be reckoned do not cover all cases falling within the class of suits or applications described in the first column, it will be impossible to hold that the article in question is exhaustive of the class," is the right one.

Before examining the language of Art. 134, I may premise by observing that it is in the nature of an exception to Art. 148 which provides for ordinary cases of redemption. It is also clear from its place that its object is to afford protection to the person in possession. Further the protection is of the same kind as that contained by implication in S. 28 of the Act, by which a prescriptive right (limited or unlimited as the case may be) is secured as against the person who has the legal ownership in him. Consequently one may safely assert that the article should be construed liberally in favour of the legal owner as it cuts down the remaining period for enforcing his rights of redmption and strictly against the transferee as he is permitted to acquire a right which in strictness he is not entitled to, and which secures to him an advantage only under special circumstances.

An analysis of the first clause of Art. 134 of the Limitation Act shows (*a*) that the suit must be to recover possession; (*b*) that the properties sought to be recovered must have been first mortgaged and (*c*) that it should have been transferred by the

1. (1903) I. L. R. 26 M. 780.

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mortgagee for valuable consideration. I have omitted the words relating to conveyance and trust in this analysis. The question then is, what is the meaning to be attributed to the word 'transfer' in the first column? If the suit is to recover possession it would not *prima facie*, lie against a transferee who has not obtained possession. It follows therefore that it is a pre-requisite of a suit under this article that the transferee from the mortgagee must have obtained possession. The word 'transfer' in this column does not simply mean a paper conveyance, but the transfer of possession. If the term 'transfer' is used in column (1) in that sense, it necessarily follows that the word 'transfer' in column (3) has the same meaning. The legislature in speaking of the date of the *transfer* in column (3) must have had in mind, the *transfer* with the attributes which that term possesses in column (1). In this view, time does not begin to run until the transferee has taken possession of the property. If we turn back to S. 28 of the Limitation Act, the right which is extinguished and which confers upon the opposite party a title by prescription is traceable to loss of possession. That is the policy of the law, and I fail to see why the legislature should be taken to have meant in Art. 134 that anything short of deprivation of possession should bar a person entitled to possession or confer upon the party not taking possession, a prescriptive title as if he had been in possession from the date of the paper transfer. The essence of the title lost and of the title acquired both under S. 28 of the Limitation Act and under Art. 134 is that one party should have lost possession and the other party should have acquired that possession. I am, therefore, apart from the authorities, of opinion that under Art. 134 a transferee from a mortgagee prescribes only from the date that he takes possession of the property transferred to him. Reference may be made in this connection to the observations of Mookerjee, J., in *Promotha* v. *Kishore* [1] and in *Priyasakhi Debi* v. *Bireshur Shamantha* [2]. Mr. Justice Muthusami Aiyar understood the word 'purchase' in the third column of Art. 134 before it was amended as relating to possession under the purchase. There is the direct authority of *Ramachandra* v. *Sheikh Mohidin* [3] in favour of the view I have indicated. *Husaini Khanam* v. *Husain Khan* [4] also is to the same effect. Nothing that has been urged in

1. (1916) 25 C. L. J. 133.
2. (1916) 21 C. W. N. 177.
3. (1899) I. L. R. 23 B. 614.
4. (1907) I. L. R 29 A. 471.

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the course of the argument in this case has led me to depart from the position so uniformly maintained.

I do not propose to discuss at length the case-law bearing on 3 and 4 Will. 4, c. 27 from which admittedly Art. 134 has been borrowed. The Indian article is far wider in its application than the English section. None-the-less, the principle which was held to underlie 3 and 4 Will 4, c. 27, has a bearing upon the present case. In *Agency Company* v. *Short* [1] Sir Horace Davey (afterwards Lord Justice Davey) contended that "Under 3 and 4 Will 4, c. 27, the title of the rightful owner to land is not defeated unless some other person or successive persons has or have been in possession thereof for a continuous period of twenty years." Lord Macnaghten accepted this contention and held that where a trespasser was in possession for less than twenty years and then relinquished possession, the law presumed that the rightful owner was in possession immediately after. In answer to the argument that when once time had begun to run, nothing can stop it, his Lordship stated: "There is not, in their Lordships' opinion any analogy between the case supposed and the case of successive disabilities mentioned in the statute. There the statute "continues to run" because there is a person in possession in whose favour it is running." Parke Baron's observations in *Smith* v. *Lloyd* [2] to the effect (Welsby, H. and Gor. 562), "We are clearly of opinion that the statute applies not to want of actual possession by the plaintiff, but to cases where he has been out of and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of Chief Justice Blackburne in *M'Donnel* v. *M'Kinty* [3], and the principle on which it is founded," were accepted by the Judicial Committee as good law. The argument of Counsel in *Attorney-General* v. *Flint* [4] seems to have proceeded on this assumption, although the question of possession did not directly arise for consideration in that case. If we bear in mind the further principle that there can be no presumption of possession in favour of a wrongdoer, it becomes clear that the rightful owner is not affected by anything

1. (1888) L. R. 13 A. C. 793.
2. (1851) 9 Exch. 562=23 L. J. (Ex). 194
3. (1847) 10 Ir. L. R. 514.
4. (1844) 4 Hare. 147=67 E. R. 597.

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short of actual possession taken against him. Compare *Secretary of State for India* v. *Krishnamoni Gupta* [1].

In this view, although the 5th defendant obtained a mortgage in 1894 for Rs. 9,000, as he did not take possession under it until 1900 and as the suit was brought within twelve years of the taking of possession, the plaintiff is not bound to pay the sum of Rs. 9,000 before redeeming the mortgage.

There is another way of looking at this question, which I do not propose to examine at any considerable length; but having regard to the fact that that point of view has found favour with one of my learned colleagues, I wish to say a word on that question. In this connection I am assuming that the word "transfer" in Art. 134 does not mean, "transfer with possession." In that view, if at the date of the transfer, the transferee had not taken possession, the Art. 134 would have no application. If the article does not apply, then the residuary Art. 144 would apply as against the person who claims to have acquired a limited prescriptive right to be redeemed. Under that article time begins to run only when the possession of the defendant becomes adverse to the plaintiff.

In my opinion, wherever both the 1st and 3rd columns of an article are not applicable to a case, we must apply the residuary articles. The function of the residuary articles is to provide for cases which could not be covered by the exact words used in both the columns of an article. After all, no legislature and the ingenuity of no draftsman can provide in terms against all possible contingencies, and that is the reason why residuary articles are inserted in the Limitation Act. In this view also the suit is in time. Therefore my view is that the claim of the 5th defendant that he should be redeemed only on payment of Rs. 9,000 to him is unsustainable.

In the light of the above observations, my answer to the first question is "No". The answer to the second question is that time begins to run only after the date of possession. I do not think it necessary to give an answer to the third question, as it does not arise for consideration in this case.

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Srinivasa Aiyangar, J.:— Article 134 of the Limitation Act has not been easy to construe, nor is it easy to apply in concrete cases. Soon after the omission in 1877 of the words "in good

1. (1902) I. L. R. 29 C. 518 at p. 526.

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faith" which qualified the word 'purchasers,' in the Limitation Act of 1871, a question arose which is not yet settled beyond controversy, whether a transferee with actual knowledge of the limited title of his transferor was entitled to the protection of the article, especially when such transferor had under no circumstances power to transfer a larger interest than he had. There was no apparent reason for treating him differently from his transferor but yet the language of the article was plain. It may be that the legislature desired in the case of transferees for value to prevent an inquisition into circumstances attending the transfer or the state of knowledge of the transferee after twelve years from the date of the transfer. Mr. Justice Ayling and myself had to consider the question in a recent case, (*Subbaiya Pandaram* v. *Mahamad Musthapa Marakayar* [1]); but that it is not the point here.

The questions referred to us are as to the applicability of the article to suits where the mortgagor had no right to sue for possession on the date of the transfer, or where the transferee does not or cannot take possession on the date of the transfer, that is one question, and the other, as to the starting point of limitation to suits to which the article applies.

The suits contemplated by the article are suits for possession, presumably by a mortgagor or his representative, (we are concerned only with mortgages here) and against the transferee or his representative. Though there was some discussion at the bar about it, there can be no doubt that the suits governed by the article are suits against the transferees or their representatives. Section V of the Act of 1859 in which the provision was first enacted is conclusive of this question, for it says 'in suits for recovery *from the purchaser or any person claiming under him.*' Further the article cannot, I think, apply to suits where at the time of the transfer the mortgagor was not entitled to sue for possession; otherwise he may be barred before he has a right of action. The mortgagor for instance may not be entitled to redeem till after the expiry of over 12 years from the date of the mortgage and if soon after the date of the mortgage the mortgagee alienates the mortgaged property and places the alienee in possession, the mortgagor would be left wholly without a remedy if Art. 134

1. (1916) 32 M. L. J. 85.

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applied in so far as the recovery of possession of his land is concerned, a manifestly unjust result. When we remember that mortgages for long terms are quite common in this country and in Malabar the common and the usual mortgage (the kanom) is irredeemable for twelve years, we would not be justified in construing Art. 134 in such a way as to indirectly take away the right of redemption of the mortgagor, while that right has been the subject of anxious protection in law; so much so that an impediment to the fair exercise of the right even by a contract of the parties at the time of the transaction, *i. e.*, a clog on the equity of redemption is not recognised. The Indian Legislature in S. 60 of the Transfer of Property Act, as has been pointed out, has omitted the words, 'in the absence of a contract to the contrary,' with a view to prevent the mortgagor from contracting himself out of his right of redemption at the time of the mortgage. Whatever doubts there may have been prior to the decision of the Privy Council in *Bakhtawar Begam* v. *Husani Khanam* [1] as to whether the mortgagor was at liberty to redeem before the time limited for payment, now, there can be no question that he cannot do so unless he reserves such a right by the mortgage contract. No doubt it may be said that a mortgagor should not bind himself not to redeem for a long period, but a Limitation Act should not be construed as fettering or affecting a substantive right. It may also be said that he may have an action for damages against the mortgagee on his covenant to place him in possession on redemption, but that would be a poor substitute for his land.

As on principle, no period of limitation can begin to run till there is a cause of action, (the third column of the elaborate schedules in the Limitation Acts of 1871 and onwards is based on this principle and the *terminus a quo* as far as possible is made to coincide with the earliest time at which an action could be brought) we ought not to construe the article, if the language admits of it, in such a way as to bar the action before the cause of action arose or even, to cut short the period so as to give varying periods of time for the same suit, varying according to the time which elapsed between the date of the transfer and the accrual of the cause of action. In construing these articles of the Limitation Act we should not lay undue stress on the first column of the

1. (1914) L. R. 41 I. A. 84 at p. 89=26 M. L. J. 474.

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article which describes the nature of the suits, and hold that all suits of that class must be governed by that article, though the starting point fixed in the third column cannot be applied at all or cannot be applied without working injustice. On this principle in *Rungiah Goundan & Co.* v. *Nanjappa Row,* [1] it was held that an application for execution of a mortgage decree which cannot be executed till after the time fixed for payment, (usually six months), is not governed by Art. 179 of the Act of 1877 but by Art. 178 of that Act. It is to be observed that one of the starting points specified in the third column of Art. 179, is the date of the decree and there is no difficulty in counting the period of limitation from that date, and it is as easy to apply Art. 179 to that case as Art. 134 to this. For other illustrations of the same principle I may refer to the decision of this Court in *Palaniyandi Malavarayan* v. *Vadamalai Odayan* [2] and *Manikkam Pillai* v. *Thanikachelam Pillai* [3], where it was held that unless there was a person in existence competent to sue, there can be no limitation. There may no doubt be cases where on ground of public policy or owing to the difficulty in fixing precisely the time when the cause of action arises, a limited period may be fixed beginning from more or less arbitrary starting points; for example a suit to recover moveable property from a depositary or pawnee must under Art. 145 of the Limitation Act be brought within 30 years from the date of the deposit, or pawn, though there may be a contract between the parties fixing a time before which the despositor or pawnor could not recover the property from the bailee. Such contracts are likely to be rare and it is obviously convenient that questions of title to moveable property which is capable of transfer by mere delivery of possession should be settled as soon as possible. It is noteworthy that though under Cl. 15 of S. 1 of the Act of 1859 the beginning of the period of limitation was the date of the transaction in suits to recover moveable and immoveable property alike, irrespective of the time fixed by the contract for such recovery and though the same provision was re-enacted in 1871, in the Act of 1877 the starting point was altered so as to coincide with the date of the accruer of the cause of action as regards suits to redeem mortgages of immoveable property. Again when the Act of 1908 was passed, in Art. 138 the starting

1. (1903) I. L. R. 26 M. 780.
2. (1915) 2 L. W. 723.
3. (1916) 4 L W. 869.

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point, was altered as to coincide with the accruer of the cause of action and clause 2 was added to S. 15, thus shewing the anxiety of the legislature to prevent any injustice by time running against a person who was unable to sue. At the same time it is to be noted that though a change was made in respect of suits for redemption or recovery of possession of immoveable property from mortgagees, no corresponding change was made in Art. 134 which provided for suits to recover possession from transferees. This may be due to the fact that Art. 134 provides for recovery from transferees, not merely, of mortgagees but also of trustees.

As regards recovery of moveable property from buyers from bailees or trustees for which provision is made in Art. 133 in practically identical terms, there is no difficulty in applying the article, as the bailor may recover possession from the buyer without reference to the time fixed in the contract of bailment as the bailor can at his option avoid the contract of bailment in the circumstances referred to in the first column of the article. (S. 153 of the Contract Act. *Donald* v. *Suckling* [1], per Blackburn, J.)

In England 3 and 4 Will 4, c. 27, S. 28, which was afterwards repealed and re-enacted as S. 7 of the Real Property Limitation Act of 1874 merely reducing the period of limitation from 20 years to 12, provided "that when a mortgagee shall have obtained the possession or receipt of the profits of any land comprised in his mortgage, the mortgagor shall not bring an action or suit to redeem the mortgage but within 12 years next after the time when the mortgagee obtained such possession". Both before the enactment, (when Courts of Equity applied the provisions of the statutes of limitation, which in terms did not apply to equity suits, in analogy to actions at law), and after, it appears to have been understood that the provisions of the statute and similar provisions in the earlier statutes did not bar redemption even after 20 years from the date of the mortgagee taking possession, if the mortgagee as such was entitled to remain in possession till his mortgage was satisfied, *i. e.*, where, as in the case of a Welsh mortgage which closely resembles a usufructuary mortgage as defined in the Transfer of Property Act there is no question of defeault, or for forfeiture or right of foreclosure (see Coote on Mortgages, pp. 32 and 33. *Yates* v. *Hambly* [2], *Fenwick* v. *Reed* [3].)

1. (1863) L. R. 1 Q. B. 585 at p. 612. 2. (1742) 2 Atk. 360.
3. (1816) 1 Mer. 114 at p. 125=35 E. R. 618

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In *Alderson* v. *White* 1, there was a sale and a covenant to resell on payment of the purchase-money at or upon the 25th March in any year. The suit was to redeem long after 20 years after the purchaser had taken possession. The Lord Chancellor in appeal held that the transaction was not a mortgage and that concluded the case. But referring to the plea of the statute he said: "I am disposed to think that the statute cannot apply so as to make the mere possession by the mortgagee for 20 years a bar to redemption when the original contract is in terms that the mortgagor may redeem at any time during a period extending beyond the 20 years".

It appears to me therefore that the stringent provisions of Art. 134 which cuts down the long period of 60 years which a mortgagor has after his right to redeem accrued, should not be construed as barring his action even before it arose, or as giving him a lesser period than 12 years if the cause of action arose after the date of the transfer, but before the expiry of 12 years, more especially as a transferee need not be a transferee in good faith. This question however does not really arise in this case and it is therefore unnecessary to answer the 3rd question in the reference.

As regards the 1st and 2nd questions I think, that unless the transferee had possession, on the date of the transfer the article cannot apply. The possession need not be physical or actual possession. As I have said already the suit must be one for possession against the transferee. The article is obviously intended to protect a person in possession for over 12 years and the article assumes that the plaintiff is in a position to sue for recovery of possession from the transferee on the date of the transfer. If on the other hand the article is so construed as to apply to cases where the transferee has not possession or cannot, or is not entitled to get possession on the date of the transfer, there is no reason to confine it to cases in which the transferee takes possession within 12 years from the date of the transfer, and not to apply it to cases where he takes possession long after 12 years from the date of the transfer. In the latter case the mortgagor's right to redeem or recover possession would cease, retrospectively as it were, the moment the transferee obtains possession, even if he gets it by the voluntary surrender of the mortgagee or his representative. To take a case which is of ordinary occurrence in Malabar, A is the jenmi and

1. (1858) 2 De. G. and J. 97 ; 3 Jur. (N S.) 125,

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grants a kanom on the 1st January 1900 to B. This is not redeemable within 12 years; and is often not redeemed for a much longer time. B sub-mortgages his mortgage interest on kanom to C a year after, *i. e.*, on the 1st January 1901 and places C in possession and immediately after, say on the 1st February 1901 sells the property to D absolutely or gives a melcharth purporting to act as the jenmi. D will have, to redeem C before he obtains possession which he may not be entitled to do till after 12 years from the 1st January 1901, *i. e.*, till January 1913 as C might claim to hold possession as kanomdar against his mortgagor B and his transferee D, though not against the jenmi A. The amount due to C is never an easily ascertainable sum, owing to his right to compensation for improvements which is often not settled till after a prolonged enquiry in Courts. Many years may elapse, even twelve years, before the rights of D and C *inter se* are settled and D becomes entitled to or gets possession through Court. In the cases supposed A cannot sue anybody for possession till after the 1st January 1912 and would have 60 years to redeem B and recover possession from C. D is not entitled to redeem C till January 1913, and may not get or even be entitled to get possession till some time after. Twelve years from the date of the transfer would expire in February 1913, and A has practically no time to bring a suit for possession from D the transferee even under the most favourable circumstances. But D may not take possession, for many a melcharth holder is unable or unwilling to pay for redemption immediately he obtains a transfer, more especially as he generally stipulates for 12 years enjoyment after he obtains possession. The real owner then may be barred, the very instant he is able to sue the transferee for possession. In this very case one of the transferees got possession after the institution of the suit for redemption. It must be remembered that there can be oral sales, in places where the Transfer of Property Act is not in force, and such sales would have been valid in all Provinces before the passing of that Act, and when the Limitation Act of 1877 was enacted. The language of Art. 134 in that Act so far as concerns the present matter was exactly the same as that of the later Act of 1908. It is difficult to see how the mortgagor can in such cases possibly know that his rights are being affected to his prejudice, assuming that there is some sort of a duty to search the registers to find out if his mortgagee has not been fraudulently

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dealing with the property in violation of the mortgage contract. It is true, that the Law of Limitation may bar a person's right, though he may not know that his rights are being infringed, but where he has no reason to believe that his rights are infringed by the act of those who are bound to protect it, it appears to be unnecessary to restrict or interfere with his right, unless the language of the statute is plain. A mortgagor can no doubt as soon as the mortgage-money becomes payable, sue to redeem the mortgage and implead in that suit the transferees of his mortgagee; but if his mortgagee is in possession on his own behalf, the suit would be governed by Art. 148 and not by Art. 134. If after the institution of such a suit the transferee obtains possession, as has happened in this very case, should the suit be dismissed as barred by Art. 134, though it was not barred at its institution? It must be remembered that the doctrine of *lis pendens* cannot apply, as the transferee obtained possession by virtue of a right created antecedent to the institution of the suit. The fact that in this case the original mortgagee had created mortgages and placed the mortgagees in possession is also immaterial, for they had been redeemed by the last transferee from whom possession is sought; the last transferee does not claim as assignee of the previous mortgagees whom he had redeemed, but as a mortgagee from the original mortgagee.

It was not suggested that suit for recovery of possession in Art. 134 do not include suits to recover possession on payment of whatever may be found due to the mortgagee, *i. e.*, suits for redemption, and no such limitation can be placed on the article.

The conclusion then, I arrive at is, that unless the mortgagor or his representative can sue for recovery of possession from the transferee on the date of the transfer the article does not apply. This construction gives sufficient protection to those who are entitled to protection, namely persons who take a transfer from mortgagees who, rightly or wrongly, they may believe, have the power to transfer an absolute title, as a mortgagee by conditional sale after condition broken, an English mortgagee after the period fixed for redemption, or a mortgagee with a power of sale after the time for the exercise of the power has arrived; as by lapse of time they may be prevented from proving facts or circumstances which would enable them to keep their purchase. That, I believe, is also the reason for the omission of the words 'good faith' in the article,

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for a person may not be able to prove it after a long lapse of time, though the omission undoubtedly may enable a transferee with notice to obtain the protection of the article. Even transferees from ordinary usufructuary mortgagees may be entitled to protection, as such mortgages, in Provinces in which the Transfer of Property Act is not in force, may be effected by delivery of possession, and a transferee from a person who has long been in possession may not be in a position to find out whether such possessor is an absolute owner or a mere mortgagee, just in the same way as it may be difficult to ascertain if a person in possession of moveable property is an absolute owner or bailee. But there is no reason to extend the protection so as to materially affect the substantive rights of owners who are not in a position to protect their interests.

If however the article is to be applied it is difficult to fix any other date than the date of the transfer, *i. e.*, the transfer of title as the starting point. That 'transfer' in this article means the transfer of title and not transfer of possession is clear; for the word 'transfer' was substituted for the word 'purchase' to settle the conflict of decisions on the interpretation of the latter word in the Act of 1877. In *In re Metropolis and Counties Permanent Investment Building Society* [1], Neville, J., held that time for redemption of a common mortgage in England commenced from the date of the *mortgagee taking possession* as provided by S. 7 of the Real Property Limitation Act of 1874 and observed that the statement in Fisher's Book that 'time will not run in the case of a common mortgage until the day of redemption has arrived; for the mortgagor cannot redeem before that day, must be accepted with caution; he apparently dissented from the dictum of Walton, J., to the contrary in a previous case. It is to be observed that there was no question in that case that S. 7 of the statute applied to the suits for redemption of common mortgages, in which ordinarily the mortgage money becomes payable in six months; there are also generally provisions in these mortgages for the mortgagor being in possession till default. There can therefore be no hardship in applying the provisions of the section. Hardship or no hardship if the language of the statute is quite plain as it is in this case, we are not entitled to take liberties with it under the guise of construing it. I am therefore with all respect unable to agree with the

1. (1911) L. R. 1 Ch. 698.

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decision in *Hussaini Khanam* v. *Husain Khan* [1]. *Ramachandra* v. *Sheik Mohidin* [2], as I read it, only decided that Art. 134 does not apply except to cases of transferees with possession.

My answer then to the questions 1 and 2 is that Art. 134 does not apply except to the cases mentioned therein.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE AYLING AND MR. JUSTICE SESHAGIRI AIYAR.

Syed Hasan Raza Sahib Shamsul Ulama and others. ... *Appellant* (Defendants 1, 4 and 7.)*

v.

Mir Hasan Ali Sahib ... *Respondent (Plaintiff and Defendants 2, 6 and 7.)*

Syed Hasan Raza Sahib v. Hasan Ali Sahib.

Election—Quorum at meetings of electoral body, rule as to—Exceptions to the rule—Notice of meeting—Member of electoral body, when entitled to—Mahomedan Law—Scheme for management of a charity—Appointment of minor, as muttawallis, *invalid.*

A scheme for the management of a Mahomedan charity provided *inter alia*, for a Managing Committee consisting of five members and three *muttawallis*, and directed that vacancies in the Committee should be filled by election by an electoral body consisting of the continuing or surviving members of the Committee. There was no provision of a *quorum* at an electoral meeting or for a minimum number of voters to be recorded for a candidate to render his election valid. Nor was there proof of any course of business adopted by the electoral body fixing the *quorum* at electoral meetings. On the occurrence of a vacancy in the committee, only three members of the electoral body which then consisted of six validly appointed members attended the electoral meetings and elected the plaintiff. *Held*, that the election of the plaintiff was invalid.

In the absence of a validly framed rule or course of business from which such a rule could be inferred fixing the *quorum* at electoral meetings, the law is that an election by a definite electoral body is valid only when a majority of that body are present at the meeting.

A member of an electoral body whose appointment as such is invalid, need not be given notice of meetings to be held by that body.

Where a scheme framed by a Court directed the appointment of competent men to be *muttawallis* of a Mahomedan religious endowment, *held* that the appointment of a minor to the office was invalid.

Appeal against the decree of the City Civil Judge of Madras, in O. S. No. A. 225 of 1914.

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* C. C. C. A. No. 9 of 1916. 5th December, 1916.

1. (1907) I. L. R. 29 A. 471. 2. (1899) I. L. R. 23 B. 614.

V. Viswanatha Sastri and *M. S. Venkatarama Aiyar* for the Appellants. Syed Hasan Raza Sahib v. Hasan Ali Sahib.

T. R. Ramachandra Aiyar, Messrs. Venkatasubba Rao and *Radhakrishnayya*, for the 1st Respondent.

T. G. Raghavachariar for the Respondents 2 to 4.

The Court delivered the following

Judgments :—*Ayling, J.* :—The suit out of which this appeal arises was brought by plaintiff (1st respondent) to declare the validity of his election as a member of the committee of the Abbas Ashoor Khana or Thousand Lights Charities in Madras. These charities are governed by a scheme framed by this Court in O. S. No. 392 of 1878. The decree in that suit (Exhibit VII) provides *inter alia* for a managing committee of five members (including the president), and three *muttawallis* working under them. Vacancies in the committee were to be filled by election by an electoral body consisting of the remaining committee members and the three *muttawallis*. According to plaintiff, he was validly elected in accordance with the rules contained in the decree at a meeting held on 7th June, 1914. Ayling, J.

Defendants Nos. 1, 4 and 5 who are admittedly members of the electoral body above referred to, raised various objections to the validity of the election, which were all rejected as baseless by the City Civil Judge, who gave plaintiff the declaration sued for. Hence this appeal.

Before us, the validity of the election was attacked on three grounds. Two of these may be briefly disposed of. It was argued :

(1) that the procedure was in contravention of rule 6 of a series of rules framed for themselves by the committee and *muttawallis* in 1888 (Exhibit IV) and

(2) that the election was void for failure to give notice of meeting to one Moulvi Mahomed Madhi Sahib, who, according to appellants, was one of the *muttawallis* at the time.

As regards (1), a consideration of Exhibit IV leaves no doubt in my mind that rule 6, which is relied on, was only intended to govern the proceedings at meetings of the managing committee, and has no application to elections by the committee and *muttawallis* conjointly. I may add that I find no evidence that this procedure was ever followed at elections. In my opinion, the objection based on this rule is without foundation.

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As regards (2), Moulvi Mahomed Madhi Sahib was at the time of his appointment as *muttawalli* in 1906 a boy of eleven years of age; and I agree with the learned City Civil Judge that his appointment is altogether void and that he did not possess the status of *muttawalli* at the time of plaintiff's election.

The third objection is of a more serious character. Excluding Moulvi Mahomed Madhi Sahib, there were six surviving members of the electoral body on 7th June, 1914: (1) President of committee (1st defendant), (2) Three members of committee (defendants Nos. 2, 3 and 4 and (3) Two *muttawallis* (Defts. No. 5 and 6). Of these only 3 persons (defendants 2, 3, and 6) were present at the meeting. The other three are found to have had notice of the meeting but they failed to attend : and they oppose plaintiff's election. It is argued that plaintiff's election, not being the act of a majority of the electoral body, is invalid.

The decree in O. S. No. 392 of 1878 simply directs that the surviving or continuing members of the committee and the *muttawallis* for the time being do elect a person from the Shia sect to the vacancy; that each elector should have one vote and the President a casting vote in case of equality and that the person to whom the greatest number of votes is given be deemed to be elected. There is no provision for a *quorum* at an electoral meeting, nor for a minimum number of votes to be recorded for a candidate to render his election valid.

The electoral body in this case is certainly "a select and definite body"; and it is hardly disputed that the general rule of English Law regarding such bodies is that any act of such a body by way of resolution at a meeting is only valid, when a majority of the body are present—*Vide* Halsbury's Laws of England, Volume 8, page 351.

Mr. Ramachandra Aiyar has however argued that this rule is not to be rigidly applied to Indian bodies; that circumstances may justify its being disregarded; that the practice of each body is the real test; and that before declaring the election invalid on this ground there are questions of fact which require to be gone into. He relies on *Anantanarayana Aiyar* v. *Kuttalam Pillai* [1] and *In re Tavistock Iron Works Company : Lyster's case* [2].

I can find no ground for holding that this rule, considered as one of general application, is less applicable in India than in England; or is one which we should not follow. There is nothing

1. (1899) I.L.R. 22 M. 481=9 M.L.J. 203. 2. (1867) L.R. 4 Eq. 238.

in the judgment of Subramania Aiyar, J., in *Ananthanarayana Aiyar* v. *Kuttalam Pillai* 1, to support such a view though he points out that the rule is one rather of English law than of general jurisprudence. The learned Judge on the other hand, applied the rule to the case before him, examined the constitution of the body in question, its particular rules of procedure and decided that there was in that case a valid rule whereby the quorum at a meeting was fixed at a number less than the number present at the meeting out of which the dispute arose. On this ground he declared the resolution valid.

In the English case quoted, *In re Tavistock Iron Works Company* which is also quoted in *Ananthanarayana Aiyar* v. *Kuttalam Pillai* 1, Lord Romilly, M. R., sought and found a ground of exemption from the usual rule in the existence of a quorum—not by specific rule—but by the course of business adopted by the particular body in that case. I may remark that in that case there was a specific rule to the effect that

"every question at a Board or a Committee shall be determined by a majority of the votes of the Directors present thereat."

In the present case it would no doubt be open to respondents to show that similar circumstances existed: a valid rule fixing the quorum at a meeting at three or less, or even a course of business from which such a rule could be inferred. But the existence of any such rule is not even suggested: and it is clear from the evidence on record that previous elections have not been held at meetings with a minority of electors present. I do not think we should be serving any useful purpose but should on the contrary be wasting the money of parties and uselessly prolonging litigation by calling for a finding on this point.

I must hold that the resolution of 7th June 1914, having been passed at a meeting attended by less than a majority of those entitled to vote was invalid.

The decree of the City Civil Judge should, therefore, be set aside and the suit dismissed; but in the circumstances I would direct each side to bear its own costs throughout.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—I agree.

My learned colleague has stated the facts and the points arising for decision. As the questions argued raise important issues, I wish to add a few words. I feel no hesitation in holding, that

1. (1899) I. L R. 22 M. 481=9 M. L. J. 203.

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—
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under the scheme the committee has power only to make rules for the meetings of the managing committee. I am also satisfied that Exhibit IV does not purport to frame rules for any business other than that to be transacted at the meetings of the managing committee.

On the question whether the election of the plaintiff by three members of the committee is valid, I felt considerable doubts during the course of the argument. To a certain extent, the authorities to which our attention has been drawn have run counter to many a preconceived idea of mine on the question of quorum. I was under the impression that unless a quorum was fixed for a body of business men, any members of that body who happened to be present at a meeting could validly bind the others by their resolution, provided due notice of the meeting was given to all. I am now satisfied that this impression is not well founded. Again it is apparent that the quorum for a managing committee cannot be fixed by that committee. The quorum should be settled by the larger body which elected the managing committee, unless that body empowered the committee to fix its own quorum. In *In re Tavistock Iron Works Company* 1 this position was made clear. The argument of counsel and the authorities quoted in that case show that unless empowered to fix a *quorum* the committee could not agree to substitute the decision of a fixed number among them for that of the whole committee.

A distinction is drawn between a committee consisting of a definite number and a body composed of an indefinite number of persons. The distinction seems to be this: In the first class of cases, the number of the select body is fixed. In the second class of cases, the number is subject to variation every year or at stated periods. For example, the number of electors of a Temple Committee or of a member for a Municipality is liable to fluctuation. Residence for a particular period, or the attaining of age of minors can bring in new electors. Whereas in the case of a Select Committee, the number is fixed. The procedure to be adopted at the meetings of these two different bodies is stated in Halsbury's Laws of England, Volume 8, pages 351 and 352. It seems well settled that an election by a definite body can only be held when the majority of that body is present to exercise the franchise. *Regina* v. *Gippo (Bailiffs Burgesses etc. of)* 2, and *Sir Robert*

1. (1867) L. R. 4 Eq. 233. 2. (1790) 2 Ld. Raym. 1232 ; 92 E. R. 313.

Salisbury Cotton and Davies [1]. Willis, J., in *Mayor, etc., of Merchants of the Staple of England* v. *Governor and Company of Bank of England* [2], states the law thus :

" The acts of a corporation are those of the major part of the corporators, corporately assembled ; Com. Dig. tit. Franchise, F. 11; and, omitting the words 'corporately assembled', this is declared by 33, Hen. VIII, c. 27, to be the common law. This means that, in the absence of special custom, the major part must be present at the meeting, and that of that major part there must be a majority in favour of the act or resolution. It was so decided in Easter Term 1693 : *Hascard* v. *Somany* [3], quoted in Viner's Abridgment, tit, Corporations, G. 3, pl. 7 : and it was said by Lord Mansfield in *Rex* v. *Monday* [4], to be undoubted law. By 'corporately assembled' it is meant that the meeting shall be one held upon notice which gives every corporator the opportunity of being present: See *Smyth* v. *Darley* [5]. The notice need not necessarily be special, but there must be such knowledge, or such means of knowledge, as to give each corporator the opportunity of attending. "

Lord Kenyon, C. J., expressed himself very emphatically on this question in *The King* v. *Bellringer* [6]. See also *Howbeach Coal Company* v. *Teague* [7], and *In re London and Southern Counties Freehold Land Company* [8].

The decisions to which Mr. Ramachandra Aiyar drew our attention do not conflict with this view of the law. In *In re Tavistock Iron Works Company; Lyster's case* [9], it was held that the Managing Committee, under the power vested in it, impliedly fixed two members as forming the quorum ; nor does *Ananthanarayana Aiyar* v. *Kuttalam Pillai* [10], support the respondent. It may be that the Temple Committee should not be spoken of as the constituent members. The word 'constituent member' can only apply to the units of an electoral body which elects the Temple Committee. However that may be the actual decision in that case does not support the position taken up by the respondent.

It was suggested that the usage of the institution was in favour of electing a member of the committee in the way it was

1. (1795) 1 Str. 53=93 E R. 380. 2. (1887) 21 Q.B. D. 160 at 165.
3. (1826) 1 Freem. 504 : 89 E.R. 330. 4. (1777) 2 Cowp. 530=98 E.R. 1224.
5. (1849) 2 H.L.C. 789 : 9 E.R. 1293. 6. (1792) 4 T.R. 810: 100 E.R. 1315.
7. (1860) 4 H. & N. 151: 157 E.R. 1136. 8. (1885) 31 Ch. D. 23.
9. (1867) L. R. 4 Eq. 283. 10. (1899) I. L. R. 23 M. 481.

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done on the present occasion. In the first place, the scheme is of so recent an origin that there has been no time for the development of custom in this behalf. In the 2nd place it is doubtful whether a custom can be pleaded with reference to a decree of court. The proper course would have been to apply for its variation. Lastly, I am satisfied that the evidence to which our attention was drawn does not establish the alleged custom. Exhibit III only relates to circulation. It is the same with Exhibit III (a). Exhibit XV has no reference to election at all. The mixed process of passing a resolution at a meeting and then having it circulated among the absent members seems to have been gone through in this instance. These documents afford no proof of the custom now set up.

For the above reasons, I agree in holding that the plaintiff was not validly elected.

One other argument may be shortly disposed of. It was said that the election was invalid as Moulvi Mahomed Mahdi Sahib was not given notice of the date and place of election. He is the son of the fifth defendant and is alleged to have been elected in 1906 when he was admittedly only eleven years of age. It is true that on the date of the present election he was a major. It is also true that on some previous occasion he was consulted as if he was legally holding the office of trustee. The argument before us was that as this gentleman was entitled to a hereditary trusteeship in the mosque, he was validly elected even though he was a minor at the time of election; and that on attaining age he was entitled to take part in the management of the institution and in discharging the other functions. I am unable to read Exhibit VII in the sense suggested by Mr. Viswanatha Sastri. The scheme directs that the managers should be elected.

"From among the male descendants of the plaintiffs and defendants, and in default of competent male descendants of the plaintiffs and defendants from amongst the other descendants of Majeed Ool Dowlah Bahadur deceased in the pleadings of the said suit No. 198 of 1868 mentioned and in default of any competent male descendants of the said Majeed Ool Dowlah Bahadur then from amongst the members of the Shiah sect of the Muhammadan community of Madras."

This provision does not create a hereditary right, but only gives a preferential claim for selection.

Further when the scheme speaks of competent men, I feel no doubt that competency as to age was contemplated. Moreover, the Muhammadan Law on this question seems clear. Both according to Imameea (the authority binding on the Shiahs) and the Haneefea "Puberty and understanding are essential in all cases to a valid appointment".

The authorities quoted for the appellants only relate to hereditary trusteeship. In such cases, the kazi is empowered to appoint a substitute during the minority of the *de jure Muttawalli.* (Ameer Ali, Volume I, pages 353 and 445, IV Edition). In *Piran* v. *Abdool Karim* [1] it was held that a *Sajjadanishinship* should not be conferred on a minor. The observations in page 220 do not suggest as was contended before us that in the case of a Muttawalli a minor can be appointed. Mr. Tyabji in his Principles of Muhammadan Law at page 411, points out the distinction between devolution and appointment by selection and says that "puberty is a *sine qua non*" in all cases of appointment.

It is clear, therefore, that the fifth defendant's son was not validly appointed and that failure to give him notice of the meeting did not render the preceedings invalid.

The decree of the learned City Civil Judge must be set aside. I agree in the order as to costs made by my learned brother.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE KUMARASWAMI SASTRI.

Battina Appanna and others ... *Appellants * (Defendants)*

v.

Sreemanthu Raja Yarlagadda Venkataramalinga Bahadur Zemindar Garu ... *Respondent (Plaintiff).*

Battina Appanna v. Raja Yarlagadda

Madras Estate Land Act—Agreement between Government and Zemindar localising lands for which latter entitled to Government water free of assessment—Water rate paid to Government prior to, in respect of such lands—Zemindar's right to, without assignment in his favour—Payment if "rent" within meaning of S. 3 Cl. (11)—Payment not "enhancement within meaning of S. 30 cls. 2, 3 and 4—Sanction of Collector not necessary to entitle Zemindar to recover it."

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* S. A. Nos. 961 to 966 of 1916. 3rd April, 1917.

1. (1892) I. L. R. 19 C. 203.

Battina Appanna v. Raja Yarlagadda.

Where by an agreement between the Government and the Zemindar lands to which the former are bound to supply water free of assessment are localised, the Zemindar becomes entitled to the water rate paid till then to Government for Government water taken by the owner of such lands. An express assignment of the right to collect the rate in favour of the Zemindar is not necessary. The payment to which the Zemindar becomes so entitled is rent within the meaning of S. 3 cl. (ii) of the Estates Land Act and the sanction of the Collector is not necessary to entitle him to recover it because there is no question of enhancement in such a case.

Second appeals against the decrees of the District Court of Kistna at Masulipatam in A. S. Nos. 154, 155, 158 to 161 of 1914, preferred against the decree of the Court of the Deputy Collector of Bandar Division in Summary Suits Nos. 67, 68, 73 77, 79 and 103 of 1913.

T. M. Krishnaswami Aiyar for *T. Ramachandra Row* for Appellants.

P. Nagabhushanam for Respondents.

The Court delivered the following

Judgment :—The land in respect of which the rent is claimed was originally dry-land. For some time, until Fasli 1318 the defendant took water from one of the Kistna Canals and paid the Government Rs. 5 as water tax and Rs. 1-8-0 to the Zamindar as rent. In Fasli 1318, the Government agreed to localise the lands to which Government was bound to supply water free of assessment.

After this arrangement the water allowed by the Government became the Zamindar's. The defendant as usual has taken his usual quantity from that water and the Zamindar has asked that the water rate of Rs. 5 paid to the Government should be paid to him. Both the Lower Courts decreed the plaintiff's claim and the tenant has appealed.

Mr. T. M. Krishnaswami Aiyar in his able argument contended before us that unless the Government assigned their right to collect the water-tax, the Zamindar is not entitled to it. But seeing that the Government have retired from the field and left the Zamindar free to make his own arrangements with his tenants, there is nothing in this contention. The learned Vakil next argued that this additional payment for water is not rent. Whatever may have been the view under the old act, S, 3 Cl. (11) of the Estates Land Act makes it clear that a payment for water supplied or taken for the Zemindar is rent. The suggestion that the term rent in this clause means rent upon the whole holding of the ryot is plausible,

but we do not think there is any substance in it. Ss. 27 and 28 to which our attention was drawn contemplate the continuance of the status quo ante in a succeeding fasli; but where under an express or implied contract, there is a promise to pay for the water taken, we fail to see how the payment due therefor is not rent.

The last contention was that as the sanction of the Collector was not obtained for the increased rent, the suit was misconceived. We do not think that an extra payment due for additional advantage is necessarily an enhancement. Where new circumstances have come into existence which require new adjustments, there is no question of enhancement. The principle of *The Manager to the Lessees of the Sivaganga Zamindari* v. *Chidambaram Chetti*[1] is applicable to this case. We do not think that Cls. 2, 3 and 4 of S. 30 have any application. They contemplate the continuance of the old state of affairs and yet a claim is made for increased rent without offering any fresh advantage. In such cases, there would be enhancement.

In the view, we have taken the tenant has been given new facilities for which he is bound to pay. The tax on his holding is the same. What he paid the Government for the water, he is asked to pay the landlord. Under these circumstances, there is no question of enhancement.

The decision of the courts below is right. The second appeals are dismissed with costs.

Vakil's fee is Rs. 10 in each of the second appeals.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SESHAGIRI AIYAR.

Chidambaranatha Thambiran *alias* Sivagnana Desika Gnana Sammanda Pandara Sannadhi and another ... *Appellants* * (*Plaintiffs*)

v.

P. S. Nallasiva Mudaliar and others ... *Respondents* (*Defendants 2 to 23, 25 to 27, 29 to 54 and L.R. of the 23rd Deft.*)

Chidambaranatha Thambiran v. Nallasiva Mudaliar.

Mutts—Alienation by the matadhipati of mutt properties—Suit under O. 1 R. 8 of the Civil Procedure Code by two persons on behalf of themselves, other thambirans and disciples—Suit to declare alienation invalid and to have the property handed over to the matadhipati—Maintainability of—Limitation—Limitation Act, Arts. 134, 144.

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* A. S. No. 399 of 1915. 22nd March 1917.

1. I. L. R. 38 M. 524.

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A suit by two plaintiffs with leave under O. 1, R. 8 of the Civil Procedure Code as representing themselves and other Thambirans and disciples of the mutt to declare certain alienations by the mahant invalid and to have the property handed over to the defendant mahant is maintainable; and the period of limitation will be as under Art. 144 or 134 of the Limitation Act; and the possession of the alienee must be regarded as adverse to the institution and to the plaintiffs who claim on its behalf.

The present suit brought on behalf of all the beneficiaries stands in some respects on the same footing as an information filed by the Attorney General in England on the information of relators to recover charitable property improperly alienated by the trustees. On such information the Court of Chancery recovered the property so alienated by cancelling the conveyance and directing possession to the trustees who did not occupy the position of the plaintiffs.

Magdalen College v. *Attorney General* [1], *Attorney General* v. *Flint* [2] followed.

Even if the mahant is not in the position of a trustee, the plaintiffs have as in *Arunachellam Chettiar* v *Velappa Thambiran* [3] sufficient interest in the institution to entitle them to sue under O. 1, R. 8 of the Civil Procedure Code in respect of a wrongful alienation of mutt property.

The nature of actions relating to charity properties and the powers of Courts therein discussed.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in O. S. No. 36 of 1913.

The Hon. The Advocate-General (S. Srinivasa Aiyangar), T. Narasimha Aiyangar and *V. Raghavachariar*, for Appellants.

T. Rangachariar, A. Krishnaswami Aiyar, S. Aravamudu Aiyangar and *C. Krishnamachariar*, for Respondents.

The court delivered the following

Judgments:—*The Chief Justice*:—This is a suit brought by the two plaintiffs with leave under Order 1 Rule 8 of the Code of Civil Procedure, 1908 as representing themselves and other Thambirans and disciples of the suit mutt to declare certain alienations made by the Mahant invalid and have the property alienated handed over to the Mahant, the first defendant. The Mahant having died during the pendency of the suit and been succeeded by the 1st plaintiff, the plaint was amended accordingly and now pray for possession to be given to the 1st plaintiff.

The Subordinate Judge has held that mutt properties as such are not trust properties and that consequently the suit is not barred under S. 92 of the Civil Procedure Code, but he has also held that the plaintiffs are not entitled to sue for possession to be given to the first defendant and that the suit must be treated as one for a declaration and is barred under Article 120 of the Limitation Act.

1. (1857) 6 H. L. C. 189=10 E. R. 1267.
2. (1844) 4 Hare 147=67 E. R. 597.
3. (1915) 28 M. L. J. 410.

If the suit properties were held by the Pandarasannadhi on trust, I think the Subordinate Judge was wrong in holding that the claim for possession was not maintainable and that the suit was barred under Art. 120 of the Limitation Act.

As regards the first point it seems to me that the present suit which is brought on behalf of all the beneficiaries stands in some respects on the same footing as information filed by the Attorney General in England on the information of relators to recover charitable property improperly alienated by the trustees. This was the regular method of recovering charity property improperly alienated, and it has been explained that in such a proceeding the beneficiaries are the persons on whose behalf the information is brought and that the function of the Attorney-General representing the Crown as *parens patriae* is simply to bring the case to the attention of the Court and ask it to provide for the due execution of the trust by securing for it the properties that belong to it. On such information the Court of Chancery recovered the property so alienated by cancelling the conveyance and directing possession to be given to the trustees who *ex hypothesi* did not formally occupy the position of plaintiffs in the suit. *St. Mary Magdalen, Oxford* v. *Attorney-General* [1], *Attorney-General* v. *Flint* [2]; and in the former case, it was held that the claim for relief was barred by limitation in the same manner as if the beneficiaries on whose behalf the information was filed had themselves been plaintiffs.

The case was argued on the footing that the Mahant was in the position of a trustee. If this be so there is no reason why the plaintiffs should not be treated in this country as performing the same function as the Attorney-General on an information and asking the Court to undertake the execution of the trust, and to recover possession of the suit properties which have been improperly alienated, such possession being given to the trustee, as the person entitled to it on behalf of the institution. But even if the Mahant be not in the position of a trustee, a question it is unnecessary to consider, I think that the plaintiffs as held in *Arunachallam Chettiar* v. *Velappa Thambiran* [3] have sufficient interest in the institution to entitle them in India to sue under O. 1, R. 8, Civil Procedure Code in respect of an alleged wrongful alienation

1. (1857) 6 H. L. C. 189=10 E. R. 1267.
2. (1844) 4 Hare 147=67 E. R. 597.
3. (1915) 28 M. L. J. 410.

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of mutt property, and that, if they are allowed to sue, there is no sufficient reason under our procedure for not granting them their full relief by ordering the property to be delivered to the present Mahant or to a Receiver.

As regards limitation if the plaintiffs have a right to sue, it arose at the time of the alienation or later and is not barred under Art. 144 or under Art. 134 if that is the article applicable, and I think the possession of the alienee must be regarded as adverse to the institution and to the plaintiffs who claim on its behalf. I would therefore reverse the decree and remand the suit for disposal according to law.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J. :—The properties in suit were purchased by a Pandarasannadhi of the Dharmapuram Adhinam in the year 1869. Another Pandarasannadhi sold them to the various contesting defendants in July 1901. The plaintiffs are the Tambirans of the mutt. They obtained leave under O. 1, R. 8 of the Code of Civil Procedure, 1908, to institute a suit on behalf of all the persons interested in the mutt. Their case was that the properties belonged to the mutt, and that their alienation in 1901 was invalid. They prayed for a declaration that the alienation was not binding on the mutt and for possession being delivered to the first defendant, who was at the time of the suit, the Pandarasannadhi. Since then, the first defendant has died and the 1st plaintiff has succeeded him in the office. The plaint was thereafter amended to the effect that the first plaintiff should be given possession on behalf of the mutt. There has been some dispute as to the scope of this amendment and of the undertaking given by the plaintiffs at the time. Although the language of the petition for amendment is not very clear, it seems to me that all that was agreed upon was that the parties should proceed on the footing that the name of the first plaintiff was to be substituted for that of the deceased first defendant.

The alienee defendants raised various pleas. The Subordinate Judge disposed of the case on the pleading. His conclusions were that the plaintiffs were not entitled to sue for possession, that they were not competent to ask that possession should be given to the first defendant and that the suit was barred by limitation. These findings were given on issues 1, 9 and 16 and the suit was dismissed. The plaintiffs have appealed.

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The question which was debated with great ability at the bar mainly related to the right of the plaintiffs to ask for possession in favour of the first defendant, the head of the mutt.

The plaintiffs by obtaining the leave already referred to represent the whole body of the worshippers. They may be said to be the beneficiaries. There is no doubt that the legal owner of the properties is the Pandarasannadhi. Ordinarily he alone could sue for their possession and for other reliefs in respect of them. The general right of the beneficiaries is to see that there is no violation of the trust, and, if the trustee does not discharge his duties properly, to apply for his removal and for the appointment of a new trustee. These are the ordinary remedies; but circumstances may arise which may estop the trustee from suing to recover possession and the beneficiaries may not desire that he should be removed from his office. In such cases, it is in the interests of the mutt that the *cestui qui trustent* should have the right to move the Court to deprive the wrong-doer of his possession and to vest it in the trustee.

The authorities in England, as I shall show presently, have recognised this right. The principle upon which the English Courts have acted is that "It is a rule in equity which admits of an exception that a Court of equity never wants a trustee". Once the Court is apprised that there have been a violation of the trust, it acts on the maxim that a trust shall never fail for want of a trustee. It is obvious that such a resort to the extraordinary powers of the Court should be made under exceptional circumstances. The authorities have laid down the limitations under which alone the beneficiaries would be permitted to sue for possession; but the rule stands good that under proper safeguards, the *cestui qui trustent* have the right to invoke the aid of the Court to deprive the trespasser of his wrongful possession and to vest possession in the trustee.

Both the learned Advocate General and Mr. T. Rangachariar relied upon Ss. 59 and 63 of the Indian Trusts Act. These provisions only relate to private trusts, but the underlying principles are applicable to public and charitable trusts as well. Section 59 of the Trusts Act lays down that where "for any other reason, the execution of a trust by a trustee is impracticable, the beneficiary may institute a suit for the execution of the trust." An inadvertent ratification by the trustee in office of an alienation by

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his predecessor would be covered by clause, "the execution of the trust by a trustee is impracticable." This would let in the beneficiary. No doubt, he can only claim that the trust should be executed. That is to say he can ask that the trust be administered. It would be in the discretion of the Court when it is seized of the trust either to direct the existing trustee to carry out the terms, or to appoint a new trustee in that behalf, or to entrust the management to an interim receiver. By giving any of these directions, the Court would be executing the trust. There is no machinery in this country for the Court itself administering to its fullest extent the trust until the objects of the trust and the fund are exhausted. Consequently, the Court often appoints a receiver until the right to the trustee ship is settled. S. 63 is a very important provision. Mr. T. Rangachariar contended that this section expressly limits the right of the beneficiary to a bare declaration, and that consequently he is not entitled to ask for possession. I do not think that the word *declaration* should be given such a narrow interpretation. Even in a suit for possession, there must be an antecedent declaration. I am inclined to think that the legislature did not intend to prevent a beneficiary from suing for possession in favour of the trustee. The beneficiary is only entitled to a declaration in his own right, but that would not prevent him from asking that the declaration be followed up by giving possession to the trustee. However that may be, S. 63 is not in terms applicable to charitable trusts and consequently its language is not conclusive of the rights of a public trustee. If this section is read along with S. 10 of the Limitation Act, it is clear that wherever trust property has gone into the hands of a stranger the beneficiary can take all the necessary steps to place it in the hands of a person who can legally administer the trust.

As regards decided cases, the learned vakil for the appellant relied strongly on *Sharpe* v. *San Paulo Railway Co* [1]. It was decided in 1873. The decision was that individual beneficiaries were not entitled to claim their share of a debt from the debtor. Lord Justice James pointed out that a bare allegation "that the trustee would not sue" cannot give a right of action to the beneficiary. Then the remedies open under such circumstances are pointed out. This is not a pronouncement that where a trustee *could not sue*

1. (1873) L. R. 8 Ch. A. 597.

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(not *would not sue*) the beneficiaries are not entitled to claim that possession should be given to him. The same learned Lord Justice a few months later held that a beneficiary can sue for an injunction that a contract of the trustee should not be completed *Dance* v. *Goldingham* [1]. If a claim for an injunction is competent, I fail to see why a suit for possession should not lie. The decision in *Gandy* v. *Gandy* [2] is exactly in point. In that case, the trustees refused to be made co-plaintiffs with the beneficiaries. Lord Justice Cotton negatived the contention that the only remedy possessed by the beneficiaries is to sue for the removal of the trustee and said "that where a covenant is entered into with one person for the benefit of another, then, if the covenantee will not sue, the person beneficially interested may sue in equity". Lindley, L. J., and Bowen, L. J., concurred in this view. *Yeatman* v. *Yeatman* [3], and *Beningfield* v. *Baxter* [4] are to the same effect. See also the observations of Lord Selborne in *Beningfield* v. *Baxter* [4]. In the latest case on the subject in *Meldrum* v. *Scorer* [5], Mr. Justice Kay reviewed all the earlier authorities and said "Therefore, in this case, I have first to see whether there are real grounds for the trustee not suing. I have to ascertain whether there has been simply a refusal on his part or whether it is a case in which the circumstances are such as to render it an inconvenient or ineffectual course that he should sue". It is clear from this dictum that it is a question in each case whether the beneficiary should be allowed to ask for the reliefs which *prima facie* should be claimed only by the trustee. The learned Advocate-General drew our attention to the nature of the relief claimed by the beneficiaries in *Consett* v. *Bell* [6], as showing that a claim that the trustee should be put in possession is within their rights. In none of the above cases was any decree passed giving the trustee possession at once. That is so, because the Chancery Court itself administered the estate and was not over-anxious to part with its control over the trust. The peculiar jurisdiction exercised by the Court of Chancery is thus stated by Wilmot, C. J. in *Attorney-General* v. *Lady Downing* [7], "The person who creates a trust, means it should at all events be executed. The individuals named as trustees are only the nominal

1. (1873) L.R. 8 Ch. A. 902.
2. (1885) 30 Ch. D. 57.
3. (1877) 7 Ch. D. 210.
4. (1886) 12 A C. 167.
5. (1887) 56 L. T. 471.
6. (1842) 1 Younge & Collyer C C. 569=62 Eng. Rep. 1020.
7. (1767) Wilm. Notes 24=97 Eng Rep. 9.

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instruments to execute that intention, and if they fail, either by death, or being under disability to act, or refusing to act, the constitution has provided a trustee...... Where no trustees are appointed at all, this Court assumes the office.... There is some personality in every choice of trustees;...and if the trust cannot be executed through the medium which was in the primary view of the testator, it must be executed through the medium which the constitution has substituted in its place". The same conditions do not apply in India, although the Courts here have the same general right of supervision over trusts and trustees. In Perry on Trusts after examining the English and the American authorities, the law is thus summarised: "If a *cestui qui trust* desires to bring a suit against a stranger, he should apply to the trustee to allow his name to be used as co-plaintiff and the trustee is bound to comply on being indemnified against the costs. If the trustee refused improperly, he may be made a defendant." This is exactly what has been done in the present case.

As regards Indian decisions *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* [1] is directly in point. In Madras, it was held in *Padmanabha Chettiar* v. *Williams*, [2] that the proper procedure is to apply either for the removal of the trustee or to have a receiver appointed. It does not appear whether in that case possession was asked to be given to the trustee. The same remarks apply to *Kamaraju* v. *Asanali Sheriff* [3]. There is an observation in this case that if a representative suit were brought, the result might be different. I do not think that these two cases have laid down anything more than that a few among the beneficiaries are not entitled to sue for possession being given to themselves on behalf of the trust. If they negative the right of the beneficiaries, under certain circumstances, to ask for possession being given to the trustee-defendant, I respectfully decline to accept them as good law. The decision in *Chattappa Nambiar* v. *Koman* [4] does not affect the present case. To that case, the trustee was not a party, nor did the plaintiffs ask that possession should be given to them. On the other hand *Subramania Iyer* v. *Nagarathna Naicker*[5] is in point. In a later case *Subramaniam Chettiar* v. *Raja Rajeswara Dorai*[6] after full argument on the question the

1. (1897) I. L. R. 24 C. 418.
2. (1899) I. L. R. 23 M 239=10 M L J 10.
3. (1899) I. L. R. 23 M. 99.
4. (1914) 2 L. W. 61.
5. (1909) 20 M. L. J. 151.
6. (1909) I. L R. 32 M 490 at 507.

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right of the beneficiary to claim that possession should be given to the trustee was expressly upheld. When the case was taken before the Judicial Committee in *Subramanian Chettiar* v. *Raja Rajeswara Dorai* [1] the eminent equity lawyer who appeared for the appellant apparently did not consider the question arguable. Although *Miyaji* alias *Mahomed Ghouse Sahib* v. *Sheik Ahmed Sahib* [2] proceeds on the construction of S. 14 of Act XX of 1863, the judgment shows that where a trustee is made a defendant, possession can be given to him in a case instituted by the beneficiaries. I am therefore of opinion that the Subordinate Judge is wrong in his view that under no circumstances can the beneficiaries sue that possession should be given to the lawful trustee.

On the question of limitation, Mr. Rangachariar contended that Art. 120 of the Limitation Act applies to the case. I am unable to agree. It may be that before Art. 134 of the Limitation Act is held applicable, more facts and more of the history of the institution of which the plaintiffs are the disciples may have to be ascertained. The allegations in the plaint state that the properties in suit appertain to the trust. The learned Advocate General argued that the words "bequeathed in trust" contemplates an original entrustment and that if the properties can be shown to have been acquired from the income of the trust property, the acquisitions would be included in it. There is great force in this contention. It is not necessary to decide this question at this stage of the case, nor the other question whether a Madathipathi is not a trustee. In my opinion Art. 144 of the Limitation Act directly applies to this case. The suit is for possession of immoveable property and consequently the first column applies. The learned vakil for the appellant contended that the third column is inapplicable as the possession of the alienees is not adverse to the plaintiffs, the beneficiaries, but only to the trustee. Authorities were quoted to show that the beneficiaries have not the same character as the trustees. I do not think it necessary to pronounce any opinion on this question as the word '*plaintiff*' in column 3, would include the beneficiary plaintiff according to the definition of that expression in the Limitation Act.

The beneficiaries sue only in the right of the trustees. They are only the *aliases* for the trustees. Under the common law of England, the beneficiaries were compellable to use the name

1. (1915) I.L.R. 39 M. 115=29 M.L.J. 856. 2. (1908) I.L.R. 31 M. 212.

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of the trustee as plaintiff. Consequently the beneficiaries derive their right to sue *through* the trustee. It is his action that they are prosecuting. In this view, what is adverse to the trustee is also adverse to the persons who derive their right to sue through him. Article 144, therefore, applies and there is no necessity for seeking the aid of the residuary Art. 120 in this case. The suit is not barred by limitation.

Another aspect of the question of limitation relates to the character in which the trustee held the properties. The dictum of Miller, J., in *Muthusamier* v. *Sree Sree Medhanithi Swamiyar* [1] that the alienation may be binding on the alienating trustee during his life-time opens up a question which requires investigation. The learned Judge, as I understand him, did not lay down that such a proposition is applicable to all trust properties. It may be that his view may have to be reconsidered after the facts have been ascertained. At this stage, I do not think it advisable to say more on that question.

For the above reasons, I would reverse the judgment of the Subordinate Judge and remand the case to him for disposal. Costs will abide the result.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— MR. JUSTICE AYLING AND MR. JUSTICE NAPIER.

Sannasi Kudumban ... *Petitioner* (Complainant)*

v.

Sivasubramania Kone and others ... *Respondents (Accused.)*

Sannasi Kudumban v. Sivasubramania Kone.

Criminal Procedure Code, S. 344—Magistrate—Adjournment—Order making payment of costs a condition of adjournment—Validity—Jurisdiction of Magistrate—Charge based on police report—Informant represented at hearing by vakil—Informant joining Police Officer in application for adjournment—Order for adjournment conditioned upon payment of accused's costs by informant—Legality.

Under S. 344 of the Code of Criminal Procedure, a Magistrate has power to make the payment of costs by one party to another a condition of granting an adjournment.

Where in a case in which the charge before the Magistrate was on a police report, the informant was represented at the hearing and joined in an application for adjournment made by the Police Officer on the ground that his vakil was absent and the Magistrate granted an adjournment on condition of the informant paying to the pleader of the accused his costs of the day, *held* that the Magistrate had jurisdiction to make the order, because the informant was under the circumstances virtually the prosecutor.

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* Crl R. C. No. 680 of 1916. Crl. R. P. No. 557 of 1916. 25th March, 1917.

1. (1913) I. L. R. 38 M. 356=25 M. L. J. 393.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the order of the Court of the 2nd class Magistrate of Madura Taluk, dated the 13th July 1916 in Calender Case No. 142 of 1916 authorising the Sub-Inspector of Police, Sholavandan to recover from the petitioner Rs. 25 being the day costs of the defence on the 24th May, 1916. Sannasi Kudumban v. Sivasubramania Kone.

K. S. Jayarama Aiyar for the Petitioner.

Public Prosecutor on behalf of the Crown.

The Court made the following

Order :—*Ayling, J.* :—The main point involved in this petition is whether S. 344, Criminal Procedure Code authorises a Magistrate to grant an adjournment conditionally on the payment of costs. The power, if it exists is certainly one very rarely exercised; on the other hand, the words of the section ("on such terms as it thinks fit") seem wide enough to cover an order making the payment of costs by one party to another a condition of granting an adjournment. This is the contention of the learned Public Prosecutor : and the only cases to which our attention has been directed (*Mathura Prasad* v. *Basant Lal*[1], *Sheo Prasad Poddar* v. *The Corporation of Calcutta*[2] and a recent decision of a single Judge of this Court in Crl. Rev. Cases Nos. 485 and 486 of 1916) are all in his favour. It is pointed out that the Code contains no provision for the recovery of costs ordered to be paid under this section. But this is not conclusive, for Ss. 433 and 488 are instances in which Courts are specifically empowered to award costs without any provision as to their realisation. As at present advised I must hold that S. 344 confers the power in question. Ayling, J.

Our attention is drawn to the fact that this case was taken up on a Police charge sheet filed on information furnished by petitioner. It appears however that petitioner had himself engaged a vakil, and that he (petitioner) applied for the adjournment in consequence of the vakil's absence. In such circumstances the fact that he was not a complainant under S. 200, Criminal Procedure Code, would not be a bar to an order being passed against him.

The petition should be dismissed.

Napier, J. :—In this case we are asked to revise the order of the 2nd class Magistrate of Madura Taluk directing the payment to the pleader defending the accused of Rs. 25 for costs of the day, Napier, J.

1. (1905) I. L. R. 28 A. 209. 2. (1904) 9 C. W. N. 18.

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the case having been adjourned at the instance of the prosecution. The charge before the Magistrate was on a police report, but the informant was represented at the hearing and joined in the application for adjournment made by the Police Officer on the ground that his vakil was absent. The order was passed under S. 344 of the Code of Criminal Procedure which is as follows:—"If from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing stating the reasons therefor from time to time postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable and may by a warrant remand the accused if in custody." We are asked to hold that the words "on such terms as it thinks fit" do not include the power to give costs. It is certainly true that such orders are very rarely made. It is also true that the granting of costs is specifically provided for in certain cases. Ss. 148, 433 and 488 contain such a power. It is argued also with considerable force that it is not an incident of ordinary criminal procedure that costs, should, so to speak, follow the event. And lastly we are pressed with the argument that, if the power to give costs was intended under this section, some provision would have been made for their recovery. These are certainly formidable arguments against reading this power into the words of the section. On the other hand it must be noted that this S. 344 applies to enquiries and trials and has no reference to the particular proceeding in which special provisions for costs are made. S. 148 is part of the procedure for prevention of the offences. Section 433 is a special provision for the High Court acting on reference and revision. S. 488 also does not apply to inquiries and trials being part of the chapter on maintenance of wives and children. The principle that where special provision is made in some cases a like power should not be read into general words does not therefore apply as between the sections. S. 344, which is under consideration, covers the whole field of criminal proceedings in which a person is an accused before a Court exercising ordinary jurisdiction. Nothing in it could be read to make any provision in the exercise of jurisdiction in the other classes of proceedings dealt with above, and it may well be that the legislature in making provisions covering this wide field thought it advisable to give wide powers to judicial officers to be exercised with proper discretion in dealing with cases coming before them in their ordinary

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procedure. The argument that there is no provision for the recovery of costs would have more force if the legislature had been careful where it does make specific provision for costs to provide also for their recovery, but it is clear that neither in S. 433 nor in S. 488 has this been done. In S. 433 the words are "the High Court may direct by whom the costs of such reference shall be paid". In S. 488 although power is given to issue a warrant for levying the amount due for maintenance in manner hereinbefore provided for levying fines, Sub-clause 8 simply states that the Court shall have power to make such order as to costs as may be just. It may be arguable that on the true interpretation of the section, these costs can be levied by a warrant, but the fact remains that there is nothing specifically laid down by the terms of the section. Apart from the very wide power given by this S. 344, there is the use of the word "terms." "Upon such terms" means something more than a mere general power to adjourn. It implies that a concession is granted to one side only on the condition that the other side suffers in some manner and bearing in mind the wide meaning attached to the words "On terms" in Civil Procedure Code, it is difficult not to assume that the legislature had in mind the ordinary form of terms, *viz.*, the payment of costs. It is true that the language of Order 9 of the Civil Procedure Code is "upon such terms as to costs or otherwise." But this argument of the specific mention of costs can be used against the contention because it is clear that the legislature treated the granting of costs as coming within the word "terms." If the language in the Code had been "upon such terms as the Court directs and may also award costs" the petitioner's argument would have more weight. Turning to authority, we find that the Allahabad High Court in *Mathura Prasad* v. *Basant Lal* [1] has held that S. 344 does give this power. It has also been so held by the Calcutta High Court in a case reported in *Seo Prosad Poddar* v. *The Corporation of Calcutta* [2] and a Judge of this Court has quite lately followed these two decisions in Criminal Rev. Cases Nos. 485 and 486 of 1916. Where the language used by the legislature is intentionally wide, as it is in this case, I think that on the whole it is best not to attempt to limit it, but to leave to the legislature the task of imposing limitations if it is found that any power exercised under this rule operates in a manner which the legislature thinks unjust. I am

1. (1905) I.L.R. 28 A 209. 2. (1904) 9 C. W N. 18.

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therefore of opinion that the power to award costs is vested in the Court under this section. It is next urged that we should interfere with this order as it was made against a person whose position in the trial was that of a witness only. I quite agree that we have power to revise any order under this section and to use that power freely for the very reason that the words are so wide. But in this case I see no reason why we should interfere. The petitioner was, in addition to being a witness, the informant to the Police. An informant is a person recognised in Criminal Procedure as initiating criminal proceedings : A person considering himself aggrieved can either lay a complaint before a Magistrate under S. 190 or give information to the Police under S. 154 and in either case he occupies virtually the same position in that he is seeking protection from the Courts exercising criminal jurisdiction. As stated above, the informant in this case employed a vakil and was virtually the prosecutor. I see no reason therefore why he should not be made responsible to the accused for the costs of the adjournment which he asked for. I would dismiss the petition.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Swaminatha Mudali and others ... *Appellants* (Defendnts)*

v.

M. Saravana Mudali and others ... *Respondents (Defendants-Plaintiffs).*

Swaminatha Mudali v. Saravana Mudali.

Landlord and tenant—Lease for 99 years—Covenant not to do any act to the detriment of the tenants—Effect of—Subsequent assertion of Mirasi *right by lessee*—Contemporanea exposito, *doctrine of, when applicable—Trusts Act, S. 90—Renewal of lease—Right of tenants to the benefit of the renewal—Tenancy by estoppel.*

In the year 1801, the East India Company who were the absolute owners of the suit lands most of which were waste granted them on lease for a term of 99 years. In the year 1840 the then owner of the leasehold interest purported to sell the lands to his brother describing himself as *Mirasidar*. In or about the year 1860 this alleged *Mirasi* right which included the occupancy rights in the lands became the subject of dispute between the then owner of the leasehold interest and their tenants (now represented by the defendants) and was finally decided to belong to the former. In 1889 however, the tenants were apparently recognised by the then owner of the leasehold interest as having occupancy rights in their holdings and *pattas* were issued to them acknowledging their *Kaipathu* rights. The

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* S. A. Nos 991 to 1051 of 1915 28th February, 1917.

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term of the lease of 1801 expired in January 1900 and thereupon the plaintiffs who were the representatives of the original lessee as well as the tenants applied to the Government in rivalry with each other, for the issue of ryotwari *pattas* to themselves. In December 1904 the plaintiffs were granted a renewal of the lease on the same conditions as before. Both in the original lease and in the renewed one, there was a covenant that the lessees "shall not do or cause anything to be done upon the leased premises, which shall grow to the annoyance, grievance or damage of the said Company, their tenants or the inhabitants or their bounds." In 1913 the plaintiffs sued to eject the tenants after the issue of due notices to quit the lands :

Held, that the plaintiffs were entitled to a decree for ejectment and that the claim of the defendants to occupancy rights in the suit lands was not made out.

The Government who were the absolute owners of the suit lands in 1801 were not bound in any way by the assertion, behind their back, of *Mirasi* rights on the part of their lessee more than 40 years after the grant of the lease. The doctrine of *contemporanea exposito* must be restricted in its application to the acts and conduct of the *grantor* beginning contemporaneously with the grant and continued thereafter for a long course of years and had no application to the circumstances of the present case.

Raghoji Rao Saheb v. *Lakshman Rao Saheb* [1], referred to.

The covenant in the original as well as in the renewed lease was the usual covenant in English indentures creating leases by which the lessor protect himself against the acts of his lessees which might injure other tenants of his, either of the same land or of neighbouring lands, and could not be construed as a recognition by Government of the occupancy rights of the defendants in the suit lands.

As neither the plaintiffs nor the defendants had any interest in the suit lands on the grant of the renewed lease and as the former never represented themselves as acting on behalf of the latter either before or at the time of the renewal of the old lease S. 90 of the Trusts Act did not operate to confer on the defendants the advantage of the renewed lease obtained by the plaintiffs.

A tenancy by estoppel cannot be created where the act of the landlord which is relied upon (and which created a lesser right than the landlord represented himself to be entitled to create), did confer upon the tenant a right as lessee for some term, however short.

Weller v. *Spiers* [2], referred to.

Second appeals against the decrees of the District Court of Chingleput in A. S. Nos. 180 to 185, 187 to 194, 196, 197, 199 to 201, 203, 204, 206, 207 to 244 and 246 of 1914, preferred against the decrees of the Court of the District Munsif of Tiruvellore in O. S. Nos. 112 to 117, 119 to 126, 128, 129, 131 to 133, 135, 136, 138 to 161, 163 to 166, 168 to 172, 174 to 179 and 449 of 1913 respectively.

T. Rangachariar for the Appellants.

The Hon. The Advocate-General (*S. Srinivasa Aiyangar*, and *V. V. Srinivasa Aiyangar* for the Respondents.

1. (1912) I. L. R. 36 B. 639=23 M. L. J. 383. 2. (1872) 26 L. T. 866.

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Sadasiva Aiyar, J.

The Court delivered the following

Judgments:—*Sadasiva Aiyar, J.*:—In these 61 connected second appeals the appellants are the principal defendants in the suits. The suits were brought in ejectment, the appellants being treated as having been sub-tenants from year to year of persons who owned rights in the lands as grantees of lease rights under the East India Company under a grant of 1801; that grant being a grant of lease rights for 99 years. After that grant expired in January 1900 the plaintiffs became direct lessees of the Government (from the date of the expiry of the prior grant) another term of 99 years. The prior grant of 1801 is evidenced by the indenture Exhibit P. while the new grant of 1904 is evidenced by the indenture Exhibit A.

The following facts may be set out to understand the contentions on both sides:

The East India Company claimed to be owners of the lands in dispute in January 1901. It appears from the Chingleput Manual that in 1760 a grant was made to the East India Company of the Chingleput District by the Nawab Muhamad Ali as Jagir or estate and that the grant was confirmed in 1763. This word Jagir is a word of very undefined signification, but as regards the particular lands in dispute the East India Company considered themselves to be the owners. Soon after January 1801 the Company became the Sovereign power for the territories in which these lands were situated and it is of course absurd to speak of them thereafter as Jagirdars of these lands under themselves or to speak of these lands as Jaghire estate.

Now the lease of 1801 under Exhibit P was made to two gentlemen, Messrs. Bosbuck and Abbott who seem to have already, (presumably with the company's permission), almost completed a brick building on a portion of the 300 cawnies of the leased lands and seem to have effected other improvements. The material portion of this document Exhibit P are to the following effect:—

1. The lessees and their heirs and assigns, etc., were entitled "to have hold, use, occupy, possess and enjoy the leased lands," with all benefits and advantages" at a yearly rent of Rs. 1,575 in consideration of a small premium of five pagodas paid them and the payment of additional premia of Rs. 105 to be paid at the end of every thirty years. (2) The lessees, &c.,

"shall not do or cause anything to be done upon the leased premises" "which shall grow to the annoyance, grievance or damage of the said company, their tenants or the inhabitants or their bounds." (3) If the lessees, or their heirs or assigns, etc., shall commit breach of any of the covenants, the Company may "re-enter" upon the leased premises "or any part thereof in the name of the whole" and "have again to possess and enjoy the same." Subsequently, by successive assignments the right under Exhibit P which I shall call grant-ownership passed in 1816 to a Mudaliar belonging to the well-known Manali family. See Exhibit Q. Since then this grant-ownership has remained either with the members of the Manali family or with the members of a family connected with them by marriage and at the time of the expiry of the lease in January 1900 the grant ownership was vested in Manali Ramakrishna Mudali, the father of the present plaintiffs.

About the year 1840 the Manali Mudaliar who then owned the grant right, seems to have sold to his brother, claiming not only the grant-ownership right but also right as *Mirasidar* in the lands. For the first time evidently, about 40 years after the grant, the person representing the original grantee, seems to have set up an independent *mirasi* right in the lands. See Exhibit S. Then about the year 1850 or so, this alleged *mirasi* right in the lands seems to have become the subject of dispute between the grant-owners and their tenants now represented by the defendants. That *mirasi* right which included the occupancy right in the lands was finally decided to belong to the grant owners as between them and their tenants. See Exhibits D to G. In 1889, however, about 11 years before the expiry of the term of the grant the tenants seem to have been recognised by the then grant-owner, as having occupancy rights in their holdings. These documents of recognition (the pattas) have been noted in the footnote at page 37 of the judgment of the District Munsif. When the term of the grant of 1801 expired in January 1900, the Revenue Officers of the District entered into correspondence with their higher officers as to the proper mode of the future disposal of these lands. In May 1900 Manali Ramakrishna Pillai applied for the renewal of the lease for another term of 99 years, or in the alternative, for the grant of a ryotwari patta to him by the Government. The tenants seem in rivalry to have applied

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for the grants of ryotwari pattas to themselves, while these questions were being considered. Ramakrishna Pillai died. The present two plaintiffs are his sons and in December 1904 they were granted a renewal lease evidenced by Exhibit A.

These suits have been brought in ejectment after the issue of notice to the defendants to quit the lands.

The lower Courts decreed the plaintiffs' suits on these two findings of facts, namely, (1) that the East India Company were full owners of the plaint lands (known as Pazhal Line lands) at the time of the grant of 1801 and that the Government were full owners at the time of the second grant of 1904 to the plaintiffs; and (2) that no *miras* right (whether it means permanent occupancy right or whether it means the peculiar right of some Chingleput *Mirasidars* to Swathantharam, Kuppatam and other minor requisites in consideration of their once having been full kudivaram owners), vested either in the grant owners or in any of their successors or in the tenants (defendants).

Now Mr. Rangachariar for the appellants (defendants) contested the validity of the above two findings of fact and he also argued a long array of other contentions which however might be summarised under 2 or 3 heads as follows :—(1) that under grant A itself of 1904 the Government recognised the occupancy rights of the defendants and that therefore the plaintiffs cannot contest such rights which they were bound to recognise under the terms of their own grant; (2) that in 1889 there was a contract by the then grant-owner Vythilinga Mudali to transfer the right of occupancy to the tenants and that there was such a transfer in 1889; and (3) that even if the transfer and the contract of transfer of 1889 conferred no permanent kudivaram rights in favour of the defendants (the tenants), they were entitled, after the plaintiffs got the second grant, to claim such occupancy rights (at least during the 99 years' term of the second grant) as against the plaintiffs (a) on the strength of S. 18 of the Specific Relief Act, or (b) under the provisions of S. 3 of the Transfer of Property Act, or (c) under S. 90 of the Trusts Act or (d) on the doctrine of estoppel.

As regards the first question, namely, whether the East India Company were full owners, the first grantees, *viz.*, the two European gentlemen to whom the Company granted the lease could not surely

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deny the title of their landlord who claimed full ownership. Mr. Rangachariar was obliged to argue that even at the time of the grant there were some mirasidars, some unknown people who had occupancy right in these lands. That is very improbable as it appears from Exhibit B that the lands were waste lands, and that it was only the grantees under Exhibit P who made improvements and built buildings thereon. We are asked to give no weight to Exhibit B on the ground that it contains some mistakes. The Lower Courts are entitled to find facts on the evidence including the documentary evidence. The question of the weight to be given to the evidence rests with them, not with us in second appeal. Even if the East India Company were known as Jagirdars in 1801, a Jagirdar might have absolute interests in waste lands and even in cultivated lands, and the presumption which has been adopted in respect of grants of Jagirs by the British Government cannot reasonably be applied to grants made by the Nawabs of the Carnatic. It also appears to me from the documents contained in Exhibit Z that the Government, the tenants, the plaintiffs' father, all acknowledged the right of the Government to dispose of these lands in their absolute discretion, either by granting ryotwari patta to anybody they liked. or by granting fresh lease. As I have already suggested, even if the East India Company were mere Jagirdars, they became full owners after the territory passed to them by treaty and their grant must be a grant of the right to directly take possession of the soil of the lands as lessees unless it is shown that somebody else owned the kudivaram rights in the lands in 1801. As regards the alleged mirasi right of others it was only, (as already remarked) about 40 years after the grant, that it was first set up and the Government is clearly not bound by what the successors of their grantees stated behind the back of Government. The case in *Raghojirao Saheb* v. *Lakshman Rao Saheb* [1] relied upon by Mr. Rangachariar has no relevancy. Their Lordships of the Privy Council point out in that case the danger of relying upon the doctrine of *contemporanea expositio* and restrict the application of the doctrine to the acts and conduct of the grantor, beginning contemporaneously with the grant and continued for a long course of years. Here we are asked to extend that doctrine to declarations of the grantees' successor made 40 years afterwards behind the

1. (1912) I. L. R. 36 B. 639=23 M. L. J. 383.

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back of the grantor. I think that we ought to accept the finding of fact of both the Lower Courts, that no mirasi right existed in these lands in 1801 in any person other than the East India Company and if none existed then, no such right could have come into existence afterwards which could be set up validly against the Government. It may also be noted here that these lands were carved out of two villages by an artificial line and hence they seem to have become known as Puzhal Line Lands. The usual argument that villages in the Chingleput District were formerly mirasi villages could not therefore be appl ed to these lands. It is unnecessary to speculate whether this assertion of mirasi right in 1840 for the first time (there being no indication in the assertion as to how the mirasi right was acquired or how it originated) was due to the grantee's anxiety to protect himself against his tenants' setting up occupancy rights in themselves or whether it was due to his intention to claim occupancy rights for his successors against the Government after the expiry of the term of the grant, or to both motives. On the findings that the Government owned and own the absolute right in the soil of the land that they are not mere melwaramdars, it is unnecessary to consider another contention raised by Mr. Rangachariar that the lands formed part of an unsettled Jaghir estate, (Clause (2) (c) of S. 3 of the Estates Land Act) and that the tenants occupying lands therein are ryots in such an estate entitled to permanent occupancy rights from the date when the Estates Land Act came into force, under S. 6 of the Act. The above disposes of contentions 1 and 2 of Mr. Rangachariar. As regards the 3rd contention namely, that the Government itself by Exhibit A directed the plaintiffs not to inferfere with the occupancy rights of the defendants, this contention is founded upon the following covenant in Exhibit A, namely that the lessees, their heirs, etc. will not do any act "which may grow to the grievance or damage of the Government of India or the Government of Madras or their tenants." Mr. Rangachariar argued that "their tenants" meant the tenants of the lands, namely the defendants. This clause has been taken from the former indenture Exhibit P of 1801 where the words are " the damage of the said company, *their tenants* or the inhabitants or their bounds". Clearly the expression " their tenants " in Exhibit P means the Company's tenants. The same expression when used in Exhibit A clearly means the tenants of the Government of India or the Government of Madras. This covenant is the usual covenant

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in English indentures creating leases by which the lessor protects himself against the acts of his lessees which might injure other tenants of his (*i. e.*, of the lessor) either of the same land or of neighbouring lands, and also against acts of his lessee which might cause nuisance or damage to neighbouring landowners.

The fourth contention of Mr. Rangachariar was argued in a rather indefinite way. That is, sometimes he argued that the event of 1889 on which he relied was a contract to transfer rights in lands and at other times as if it was a completed transfer of such rights. I shall consider his contention in both of its aspects. So far as I could find from the written statement, (paragraph 9) the defendants do not set up that there was a contract by Vythilinga Mudaliar to transfer his mirasi or occupancy right to them. Nor do they set up that there was an actual transfer of any, such right. A transfer of the permanent occupancy right in immoveable property can be made either by a registered instrument or by giving possession if the transfer was an oral transaction of sale. As I said, I cannot find any language in the written statement, which could be treated as asserting a transfer to defendants at that time of an occupancy right. On the other hand, paragraph 9 says and implies that Vythilinga Mudaliar had not got any occupancy right and that the ryots had occupancy right all along, that that right of theirs had been judicially recognised and that all that Vythilinga Mudali did was himself to recognise the right which had been in the tenants from the long past. The theory of transfer being thus brushed aside, there is the question of the contract to transfer. Again, I cannot find that there was a contract to transfer any right, set up in the written statement. It denies that Vythilinga Mudaliar had any rights of occupancy which he could contract to transfer. Assuming however for arguments' sake that there was a contract to transfer or that there was a transfer I shall shortly consider the contentions based under the heads (a) (b), (c) and (d) already set out. Coming to S. 18 of the Specific Relief Act, it has no application as the defendants do not seek any specific relief in this case based on any such contract, that is, they are not suing for specific performance of the alleged contract of transfer of occupancy rights to last for the second term of 99 years. With regard to S. 43 of the Transfer of Property Act, that applies to cases where a person erroneously represents that he is authorised to transfer certain

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rights in immoveable property. No such representation is alleged and we are asked to imply such a representation as having been made in 1889. It is impossible, in my opinion, to imply any such representation from the mere fact that in issuing pattas Vythilinga Mudaliar called himself the mirasidar of the land and then acknowledged the tenants'..............(kaipathu) rights. Coming to S. 90 of the Trusts Act, it applies to cases where a tenant for life or co-owner or mortgagee or other qualified owner, avails himself of his position as such and gains an advantage in derogation of the rights of other persons interested in the property, or where he *is representing all persons interested in such property gains* any advantage. It is impossible from the facts of this case to hold that the plaintiffs represented themselves as acting on behalf of these tenants also or ever did represent these tenants when or before they obtained the renewal. On the date of the renewal of Exhibit A they had themselves ceased to have any interest in the lands. Nor had the defendants any rights in the land on the date when the fresh grant was made. S. 90 of the Trusts Act therefore has no application. (See also *Hattikudur Narain Rao* v. *Andar Sayad Abas Sahib* [1], where Hannay, J. and myself (myself with some hesitation) held that where a land really belongs to Government, no question of estoppel and no question under S. 43, Act IV of 1882 arise so as to interfere with the rights of the subsequent grantee from the Government.

Coming to the question of estoppel a tenancy by estoppel cannot be created where the act of the landlord which is relied upon (and which created a lesser right than the landlord represented himself to be entitled to create), did confer upon the tenant a right as lessee for some term, however short. (See Foa on Landlord and Tenant page, 473) See also *Weller* v. *Spiers* [2].

In the result I would dismiss all these second appeals with costs. Pleader's fee 15 rupees in each case.

Spencer, J.:—I agree.

A. V. V.

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1. (1914) 28 M. L. J. 44.
2. (1872) 26 L. T. 866.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR.

Raja Rajeswara Muthuramalinga Sethupathi. ... *Petitioner* * (*Plaintiff.*)

v.

Mahalinga Raju and another ... *Respondents* (*Defendants.*)

Muthuramalinga Sethupathi *v.* Mahalinga Raju.

Limitation Act, Arts. 61, 120—*Suit by landholder to recover one-half of road cess paid by him from the ryot—Art.* 120 *whether applies to all cases of statutory liability—Nature of the ryot's obligation to pay road cess—Statutory duty—Madras Estates Land Act, S.* 3 (11)—*Rent—Road cess is rent within the meaning of S.* 3 (11).

A suit by a landholder to recover one half of the road cess paid by him from the ryot is governed by Art. 61 of the Limitation Act.

It is not the law, that wherever there is a statutory liability to pay a sum of money, the article of the Limitation Act applicable for a suit to recover the amount is only Art. 120.

Observations of Petheram, C. J., in *Secretary of State for India* v. *Guru Prasad Dhur* [1], dissented from.

The obligation to pay road cess on the part of the ryot is a statutory liability under the Local Boards Act. Arrears of road cess payable by a ryot are of the nature of rent within the meaning of S. 3 (11) of the Madras Estates Land Act.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Paramakudi dated the 13th day of December 1915 in S. C. S. No. 1085 of 1915.

L. A. Govindaraghava Aiyar and *R. Krishnamachariar* for Petitioner.

T. M. Krishnaswami Aiyar amicus curiæ for the Respondents.

The Court delivered the following

Judgment:—The case is one of first impression, but as the arguments have been addressed to me fully on the points arising for decision, I do not think that any useful purpose will be served by reserving my decision in this case. The suit was brought by a landholder to recover the road cess paid by him for two faslis. A decree was passed for half of the road cess paid in fasli 1322. As regards the other half the Lower Court held that the landholder himself was bound to pay it. As regards fasli 1321, the District Munsif held that the claim for half of the cess payable to the landholder was barred by limitation. In this Court, Mr. Govindaraghava Aiyar does not claim that the whole of the road cess was payable

* C. R. P. No. 413 of 1916. 17th April, 1917.

1. (1892) I. L. R. 20 C. 51.

Muthu-ramalinga Sethupathi v. Mahalinga Raju.

by the tenant, but confined the claim to half of the cess paid by his client. The only question for decision is whether the Lower Court is right in the view that the payment made in 1321 by the landlord cannot be recovered as it is barred by limitation. Before proceeding further, I must express my indebtedness to Mr. T. M. Krishnaswami Aiyar for the very able manner in which he has assisted me in this case on behalf of the counter-petitioner who has not been represented in this Court.

There are 3 points for consideration. The first point is how does the obligation to pay the road cess by the tenant arise? I agree with Mr. Govindaraghava Aiyar that it is under the Act that the obligation arises. It is not a common law duty. It is true that in the definition of 'rent' given in S. 3, (cl.) 11 of the Estates Land Act, any local tax or cess payable is included, but the proportion to be paid by the tenant is fixed only by the Local Boards Act. I must take it that the liability to pay half of the cess is created by that Act: It is not by virtue of the Estates Land Act that the landholder is entitled to claim although he is entitled to tack on the local cess to the rent due from the tenant. The next question is what is the nature of the payment to be made. There can be no doubt that it is in the nature of rent. The definition to which I have already referred shows that the tenant is bound to pay the cess along with the rent and the landlord is entitled to exercise all the provisions of the Act in the collection of it. Under the Estates Land Act, a limitation of 3 years is fixed for the collection of the rent including the road cess. Under the general Limitation Act, there is only a limitation of 3 years. Although the suit is for arrears of the local cess, I have very little doubt that the nature of the liability on the part of the tenant is of the same character as if he was called upon to pay rent on his holding.

The last question which is of considerable importance relates to limitation. The broad proposition was advanced by Mr. Govindaraghava Aiyar that wherever there is a statutory liability to pay a certain sum of money, the residuary Art. 120 should apply to it and not the specific articles dealing with the question: and he relied upon the observations of Petheram, C. J., in *The Secretary of State for India in Council* v. *Guru Prasad Dhur* [1] in support of his position. In *Secretary of State for India in Council* v. *Guru Prasad Dhur* [1], the suit was to recover the surplus of

1. (1892) I. L. R. 20 C. 51.

Muthu-ramalinga Sethupathi v. Mahalinga Raju.

sale proceeds from the Secretary of State who had sold the holding for arrears of revenue. The learned Judges who constituted the Full Bench came to the conclusion that the Secretary of State was not a trustee and that Art. 62 has no application. Chief Justice Petheram, says that "the Limitation Act does not prescribe any period of limitation due under a statutory liability to pay it, so the suit is, I think, within Art. 120." With all respect I am unable to say why a statutory liability should not bring a claim under the specific articles if otherwise the words are capable of covering it. In the present case, as was pointed out by Mr. Krishnaswami Aiyar, I think that Art. 61 is applicable. Under that article, money must have been paid by the plaintiff for the defendant. Mr. Govindaraghava Aiyar contended that as the defendants were not bound to pay to the Government, this article has no application. I am unable to follow this argument. Under S. 73 of the Local Boards Act, the landlord is given the power under the second proviso to recover from the tenant one-half of the amount payable in respect of the land occupied by the tenant. As I have said at the outset, it is under this statutory liability that the plaintiff seeks to recover the amount. S. 76 makes it incumbent upon the tenant to pay the rent to the landlord. Otherwise I see no provision in the Estates Land Act or the Local Boards Act which compels the tenant to pay the local cess to the landlord. If the amount is payable by the tenant, I am clear that Art. 61 of the Limitation Act would cover the case.

I am supported in the view I have taken by the case cited by Mr. Krishnaswami Aiyar which was decided in this Court, namely, *Ramakrishna Aiyar* v. *Subramania Aiyar* [1]. In that case, it was held that money payable under the obligation created by the Transfer of Property Act would fall under Art. 132 of the Limitation Act. It was clearly a case of statutory liability. If Petheram, C. J.'s observations are followed, the decision in that Madras case must hold that Art. 132 has no application and that Art. 120 applies. As I said before, I am unable to follow the reasoning of the learned Chief Justice that all cases of statutory liabilities should be relegated to the residuary article. The cases quoted by Mr. Govindaraghava Aiyar are distinguishable. *President of the Municipal Council, Guntur* v. *Srikakulapu Padmarazu* [2] was a suit by the President of a Municipality to recover

1. (1905) I. L.R. 29 M. 305. 2. (1881) I. L R., 3 M 124.

Muthu-ramalinga Sethupathi v. Mahalinga Raju.

a tax. There is no article of the Limitation Act which could apply to such a suit as that, and therefore it was held that the residuary article applied. As regards *Nilakanta* v. *Imam-sahib* [1] and *Mohideen Ibrahim* v. *Mahomed Musa Levvai* [2], they were cases where a Court purchaser whose purchase had been annulled sought to recover the money deposited by him. Neither Art. 61 nor Art. 62 could apply to such a case and therefore the residuary Art. 120 was applied. *Unichaman* v. *Ahmed Kutti Kayi* [3] has no application at all because that was under a registered contract and there was an implied obligation and it was held that the rule of 6 years' limitation applied. My conclusion therefore is that the proper article applicable to the suit is Art. 61 and that the Lower Court is right in holding that the payment made in fasli 1321 is barred by limitation. Therefore this petition must be dismissed.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE BAKEWELL.

Tirumalai Kandama Kondala Nagayya Ramakrishna Kadirvelusami Naicker, minor by his mother and guardian Veluthayammal ... *Appellant* * (*Respondent-6th Deft.*)

v.

The Eastern Development Corporation, Ltd., London through its authorised agent P. W. Partridge with General Power of Attorney from H. D. Drummond, the Director of the said Company. .... *Respondents* (*Petitioner-Assignee-Decree-holder.*)

Tirumalai Kadirvelusami Naicker v. The Eastern Development Corporation, Ltd.

Civil Procedure Code, Or. 34, R. 6—"The plaintiff" whether includes a first mortgagee-defendant who is given liberty under the decree to apply for sale of the properties—Transfer of Property Act, S. 90—Decree for sale of the mortgaged properties passed by one Court—Decree transferred to another Court for execution—Whether the latter Court can pass a personal decree.

Where in a suit by the 2nd mortgagees against the mortgagor and the 1st mortgagees, a decree was passed by which the puisne mortgagees as well as the

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* A. A. O. 115 of 1915. 27th March, 1917.

1. (1892) I. L. R. 16 M. 361.
2. (1912) 23 M. L. J. 487.
3. (1897) I. L. R. 21 M. 242.

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first mortgagees were declared entitled to apply for the sale of the mortgaged properties, the first mortgagees though arrayed as defendants can apply for a personal decree under O. 34, R. 6 of the Civil Procedure Code. The intention of the Court in passing such a decree was to treat both the mortgagees as plaintiffs and to enable them to obtain all the further reliefs in that capacity.

Where a decree for the sale of the mortgaged properties is transmitted to another Court for execution, such Court has no power to pass a personal decree under S. 90 of the Transfer of Property Act.

The power of passing a supplementary decree in the suit after a judicial determination of the question of the liability of the mortgagor is only with the Court in which the mortgage suit was instituted Observation of Sir Bashyam Aiyangar, J, in *Mallikarjunadu* v. *Linga Murthi* [1], dissented from.

Appeal against the order of the District Court of Madura dated 23rd March 1915 in E. P. No. 4 of 1915 in A. S. No. 166 of 1901 on the file of the High Court, Madras (O. S. No. 65 of 1897 on the file of the Court of the Subordinate Judge of Tinnevelly).

The original plaintiffs who were the second mortgagees of the Gandamanaickanur Zamindari instituted a suit in the year 1897, in the Tinnevelly Sub-Court, on their mortgage against the 1st defendant, the mortgagor and the other defendants who were the prior mortgagees; that Court only gave the plaintiffs a money decree and on appeal a mortgage decree was passed by the High Court in 1905. The mortgage decree so passed by the High Court in addition to the usual directions provided as follows: "and this Court doth further order and decree that the 2nd and 3rd respondents" (the first mortgagees) "be at liberty to apply for sale under this decree." At the instance of the 1st mortgagees an order absolute was passed in 1907. In the year 1913, the interest of the 1st mortgagee-decree-holders was assigned to the respondent corporation who applied for execution under Order 21, rule 16 to the Tinnevelly Sub. Court. That Court recognised the corporation as assignee-decree-holder and transmitted the decree to the District Court of Madura for execution as the properties were situate within the jurisdiction of the latter Court.

The properties were subsequently sold by the Madura District Court at the instance of the corporation in 1914. The amount realised by the sale was found insufficient to meet the amount of the decree on the first mortgage; and consequently the corporation applied to the Madura District Court for a supplementary decree under O. 34, R. 6 and for attachment of the other properties of the

1. (1902) I. L. R. 25 M. 244 at 287=12 M. L. J. 279.

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6th defendant who was the legal representative of the mortgagor. A supplemental decree was passed by that Court so far as the other properties which descended to the 6th defendant from the mortgagee were concerned and attachment was ordered. Against that decree the 6th defendant preferred this appeal to the High Court.

T. Rangachariar and *N. Rajagopalachariar* for the Appellant.

A. Krishnaswami Aiyar and *C. A. Seshagiri Sastri* for the Respondent.

The Court delivered the following

Seshagiri Aiyar, J.

Judgments:—*Seshagiri Aiyar, J.*—In order to appreciate the contention raised by the learned vakils in this case, it is necessary to state that a suit was brought in the Court of the Subordinate Judge of Tinnevelly by the second mortgagees against the mortgagor, the 1st defendant, and the first mortgagees, the second and third defendants. On appeal to the High Court from the judgment of the Subordinate Judge a decree was passed by which the puisne mortgagees as well as the first mortgagees were declared entitled to apply for the sale of the mortgaged properties. An order absolute was passed by the Subordinate Judge; after that, as the major portion of the properties mortgaged was in the Madura District, the decree was transferred for execution to that District. The present application was made by the transferee of the rights of the first mortgagees for a personal decree. The District Judge passed an order in his favour. In appeal Mr. Rangachariar has taken three objections to the order. In the first place he contends that as the first mortgagees were not the plaintiffs in the suit, their transferees are not entitled to obtain a personal decree in his favour. He relied upon the language of Order 34, Rule 6 which says that the plaintiff may apply to the Court for passing a personal decree. The form given in the Civil Procedure Code is also in favour of his contention, but in the present case, a decree was passed in favour of the second mortgagees as well as of the first mortgagees. The High Court intended that both of them should have equal rights for applying for the other reliefs consequent upon the mortgage decree Mr. Rangachariar referred us to Rule 12 of Order 34. The decree passed in this case does not conform to that provision. It seems to me that the intention of the Court which passed the decree was to treat both the mortgagees as plaintiffs and to enable them to obtain all the

Thirumalai Kadirvelusami Naicker v. The Eastern Development Corporation, Ltd.

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further reliefs in that capacity. Therefore I am unable to agree with Mr. Rangachariar in his first contention. I may also say that the decision in *Govinda Taragan* v. *Veeran* [1] to which Mr. Krishnaswami Ayar drew our attention supports the view I have taken in this case. Therefore I overrule the first contention.

On the second point, namely, that an application for a personal decree should have been made to the Subordinate Judge of Tinnevelly and not to the Madura Court, I agree with the learned vakil's contention. Mr. Krishnaswami Aiyar laid considerable stress upon the fact that in this Court beginning with *Mallikarjunadu Setti* v. *Lingamurthi Pantulu* [2] the uniform course of decisions has been to regard applications of a personal decree as applications in execution. In a very recent decision reported in *Hussain* v. *Karim* [3], Mr. Justice Kumaraswami Sastriar and myself followed the view taken in *Mallikarjunadu Setti* v. *Lingamurthi Pantulu.* [2] But in my opinion this question is not concluded by what was decided either in *Mallikarjunadu Setti* v. *Lingamurthi Pantulu* [2] or in *Hussain* v. *Karim.* [3] The decree which was sent to the Madura Court was a decree for the sale of the mortgaged property and it is a well established rule of law that an executing Court has no power to vary a decree. It follows from this that the Madura Court has no power to pass a decree against properties other than those which have been mortgaged. The wording of S. 39, Clause C and of Rules 6 to 9 of Order 21 shows that the executing Court is to have admitted jurisdiction in regard to the matter which is transmitted to it. The decision in *Sreekrishen Doss* v. *Alumbi Ammal* [4] also shows that except upon the particular questions transmitted for execution, the original Court retains full jurisdiction to deal with the subject-matter of the suit in all its stages. Reference may also be made to the decision in *Swaminatha Aiyar* v. *Vaidyantha Sastri* [5]. Mr. Krishnaswami Aiyar quoted an *obiter dictum* of Justice Bhashyam Iyengar in *Mallikarjunadu Setti* v. *Lingamurthi Pantulu* [2] to the effect that an application for a personal decree should be made to the Court which executes the decree. I have the highest respect for the learned Judge but I am unable to accept his view that where a decree for the sale of immoveable property has

1. (1911) I. L. R. 36 M. 32=21 M. L. J. 941. 2. (1902) I. L. R. 25 M. 244.
3. (1915) I. L. R. 39 M. 544. 4. (1911) I. L. R. 36 M. 108=21 M. L. J. 777.
5. (1905) I. L. R. 28 M. 466.

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been transmitted to the executing Court, that Court will have power to pass a personal decree.

Upon the third question whether a succession certificate is necessary, it is enough to say that the 2nd defendant and his sons seem to have been members of a joint Hindu family. In the view taken by the learned District Judge the question as to whether a succession certificate was necesssary if they were members of a joint family did not arise for consideration. When application is made once again to the proper Court the question whether a succession certificate is necessary and whether the legal representatives claim by succession or by survivorship may have to be considered by that Court. In the view I have taken upon the second question the order of the learned District Judge must be reversed, and he should be directed to send the application for prosecution to the proper Court. The appellant is entitled to his costs in this Court. Costs in the lower Court will be provided for in the revised decree.

Bakewell, J.

Bakewell, J. :—The proper decree to be passed in the suit is given in Appendix D, Form 8 which contains the provision that if the net proceeds of the sale are insufficient, the plaintiff shall be at liberty to apply for a personal decree. This provision amounts to an express reservation of the power of the Court to determine the extent of the personal liability of the mortgagors; but the omission of the provision does not, I think, preclude the Court from considering the question in the exercise of the power expressly conferred upon it by rule 6 of order 34. "What therefore has been transferred for execution is merely the decree in the suit for the sale of the property and it is a well-settled principle that the executing Court cannot vary or import any provision into the decree what has been transferred to it for execution. In my opinion, the power of passing a supplementary decree in the suit after judicial determination of the question of the liability of the mortgagor must be in the Court in which the mortgage suit was originally instituted. The question of personal liability and the necessity of a succession certificate will have to be determined by that Court, but I may point out that the preliminary decree for sale is in favour of both the 2nd mortgagees as well as the first mortgagees, one period of redemption only being given. The first mortgagee would ordinarily be entitled to a decree that he should be redeemed by the second mortgagee and upon the failure of the latter to redeem,

Thirumalai Kadirvelusami Naicker v. The Eastern Development Corporation, Ltd. — Bakewell, J.

he would be entitled to ask that the suit should be dismissed or that an order should be passed for the sale of the property. It cannot be doubted that such an order would constitute him a decree-holder in the suit. I do not think that it can be deemed from the proceedings in the case that the Court intended by the form of the decree to vary any of the remedies of the first mortgagees. I agree that the first mortgagees in this case should be treated as the plaintiffs in the suit within the meaning of Order 34, Rule 6 of the Code of Civil Procedure.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. [FULL BENCH.]

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE OLDFIELD, AND MR. JUSTICE KUMARASWAMI SASTRI.

Vaidyanatha Sastri ... *Appellant** (*Plaintiff*),

v.

Savithri Ammal and others ... *Respondents* (*Defendants*).

F. B. — Vaidyanatha Sastri v. Savithri Ammal.

Hindu Law—Widow—Adoption under authority from husband—Right of adopted son to set aside alienations by widow prior to adoption, during her life-time.

A son adopted by a Hindu widow under her husband's authority, can during her life-time recover property alienated by her for no necessary purpose before the adoption was made.

Sreeramulu v. *Krishnamma* [1], overruled.

Second Appeal against the decree, dated 29th day of September 1914 of the Court of the Subordinate Judge of North Arcot in Appeal Suit No. 41 of 1914 preferred against the decree of the Court of the District Munsif of Tiruvannamalai in Original Suit No. 361 of 1913.

The Court (Sadasiva Aiyar and Spencer, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH† :—

Sadasiva Aiyar, J.

Sadasiva Aiyar, J. :—I must confess that the strong inclination of my mind is to follow the decision of Justice Sir Bashyam Iyengar in *Sreeramulu* v. *Kishnamma* [1]. I was a party to the decision in *Subbamma* v. *Subrahmanyam* [2] and in my judgment in that case, I have mentioned a few further considerations which in

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* S. A. No. 275 of 1915. 26th July, 1917.

† 22nd January, 1917.

1. (1902) I. L. R. 26 M. 143=12 M. L. J. 197. 2. (1915) 30 M. L. J. 260.

F. B. Vaidyanatha Sastri v. Savithri Ammal. Sadasiva Aiyar, J.

my opinion ought to induce Courts to support the validity of alienations by a widow heir till at least the end of her life. The legal status of a Hindu widow and the legal status of a Hindu reversioner have been made so anomalous and complex by commentators and by the decisions of Courts that almost any decision in which such rights are discussed by even an eminent Judge like Sir Bashyam Iyengar can be subjected to criticisms of a plausible character. Of course, it follows that another decision coming to a diametrically opposite conclusion like that of Sir Chandavarkar, J. in *Ramakrishna* v. *Tripurabai* [1] can be made the subject of not less effective criticisms by lawyers of learning. I shall not therefore try to add to the confusions and anomalies existing on this subject by attempting an elaborate support of Sir Bashyam Iyengar's views or an elaborate criticism of Sir Chandavarkar's views. I feel, however, bound to state (with reference to the argument of Mr. T. R. Krishnaswamy Aiyar, *contra*) that I am not able to see any inconsistency between Sir Bashyam Iyengar's views found in different portions of his judgment as to the starting point for the period of limitation as regards suits brought (*a*) during the life-time of the widow and (*b*) after the death of the widow, nor do I think it against the law to hold that the reversioner who succeeds by reason of a widow's surrender of the estate in her hands does not thereby enable the said reversioner to recover the properties which had been alienated by her before that surrender even during her life-time.

As regards the case in *Bonomali Roy* v. *Jagat Chandra Bhowmick* [2] their Lordships of the Privy Council do not indicate the section of the Limitation Act of 1859 under which the suit was treated as barred or what the period of limitation (6 years or 12 years) was by whose lapse, the suit became barred. That Act does not contain schedules of articles like the later Acts of 1877, 1882 and 1908 and makes no such difference between suits brought during the life-time of the widow and after the death of the widow as is made in Arts. 125 and 141, Sch. I of the present Limitation Act. It seems to contain only one general section (S. 12) corresponding to Art. 144 of the present Act giving a period of 12 years for possession of immoveable property or *of any interest* therein. S. 16 of that Act gives six years for all suits not expressly provided for. A suit to set aside a lease

1. (1908) I. L. R. 33 B 88. 2. (1905) I. L. R. 32 C. 669 (P. C.)

F. B.

Vaidyanatha Sastri v. Savitbri Ammal.

Sadasiva Iyer, J.

improperly granted by a manager is not expressly provided for in that Act. An adopted son as distinguished from a contingent reversioner becomes entitled to a vested interest on the date of his adoption, in his adoptive father's estate. His right to bring a suit under the Act of 1859 for possession of his said vested interest in the immoveable property (though physical possession might be postponed till the death of the widow alienee his adoptive mother) might be made to arise under the Act of 1859 on the date of his adoption itself. Further in that Privy Council case, the alienation by way of lease had been made, not by B, the widow and heir of the last male owner but by B's mother-in-law (whom I shall call A) acting as manager for her son's widow B. The question in that case was as to when the cause of action for C, the son adopted by B (the daughter-in-law) to her husband to sue *to set aside the lease granted by his adoptive grand-mother* and to recover possession of the property, arose and not the question of his right to sue for bare possession of any property alienated by *his adoptive mother directly*. Now, the right to avoid the lease granted by A was in the widowed daughter-in-law B between 1837 (when the lease was granted) and 1846 (the date of the adoption of C by B) but as soon as the adoption was made, *the right to avoid* became vested in the adopted son C and it was that right that was held to be barred (if I understand the Privy Council decision aright) probably by S. 16 of the Act of 1859.

It will be seen from the judgment of the High Court of Calcutta in pages 672 to 674 that the setting aside of the lease of 1837 was held necessary before possession could be got from the lessee and that suit was held barred under the Act of 1859, *at the latest* 12 years after the adoption of C. The decision of the Privy Council in *Bonomali Roy* v. *Jagat Chandra Bhowmick* [1] has therefore in my opinion no bearing on the question as to the applicability of Ss. 125, 141 and 144 of the present Limitation Act or on the question as to whether an alienee from the widow herself (not from her alleged manager acting beyond the scope of the manager's authority as in the Pirvy Council case) is valid in the alienee's favour during the life-time of the widow against the adopted son.

1. (1905) I. L. R. 32 C. 669.

F. B.

Vaidy natha Sastri. v. Savithri Ammal.

However, as my learned brother thinks that the question should be referred to a Full Bench, I do not think that I should object to this difficult question of law being so referred to a Full Bench on the mere ground that the principle of *stare decisis* should not be lightly departed from.

Spencer, J.

Spencer, J.:—The question which arises for our decision in this second appeal is whether an adopted son who has been adopted by a widow under authority given by her husband can during the widow's life-time sue to recover possession of property alienated for purposes not binding upon the inheritance at a date prior to the adoption. This question has been answered in the negative in *Sreeramulu* v. *Krishnamma*[1] by Mr. Justice Bhashyam Iyengar. He held that if an alienation was made not for a necessary purpose the subject of it would fall into possession as a vested remainder only at the termination of the widowhood, and the adopted son must wait till that event to bring a suit to recover it. We have not been referred to any other decision of this Court directly on the point. But this decision was dissented from in *Ramakrishna* v. *Tripurabai*[2] by Chandavarkar and Heaton, JJ.; and in *Sinnachami* alias *Kumarettu Servaigar* v. *U. A. R. Ramasami Chettiar*[3] the late Chief Justice expressed a doubt whether *Sreeramulu* v. *Krishnamma*[1] had been correctly decided. In Mayne's Hindu Law, 8th Edition, paragraph 197, the question is considered as to the date on which the right of the adopted son arises in the case of an adoption by a widow after her husband's death; and the learned author quotes several authorities for his opinion that the son's rights date from the adoption. He notices the decision of Bhashyam Iyengar, J. in *Sreeramulu* v. *Krishnamma* [1] and observes that this decision proceeds upon a view which, if correct, cuts at the root of his reasoning. He says "when the case arises again it will be material to consider whether the widowhood, that is, the possession of a widow's estate was not terminated by the act of adoption as much as by civil death". The question has now arisen again for a decision by this Court. The Privy Council decision in *Bonomali Roy* v. *Jagat Chandra Bhowmick* [4], to some extent supports the view taken in *Ramakrishna* v. *Tripurabai* [2]. In that case a widow adopted a son in 1846 who attained majority in 1856 and died in

1. (1902) I. L. R. 26 M. 143.
2. (1908) I. L. R. 33 B. 88.
3. (1911) 10 M. L. T. 463.
4. (1905) I. L.R. 32 C. 669.

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1880. The widow who, prior to the adoption, granted a lease of a portion of her husband's estate died in 1894. It was held by their Lordships of the Privy Council that the right of action to set aside the lease as invalid, arose on the adoption and that time would begin to run from the date when the adopted son attained majority. This dictum cannot be explained away on the ground that the Act of Limitation in force when the cause of action arose was Act XIV of 1859 because even under that Act the possession of a widow would not become adverse to the right of a reversioner until the widow's death (see *Sambasiva* v. *Ragava* [1]) and therefore the decision is only explainable on the supposition that their Lordships placed the rights of an adopted son on a different footing from those of a reversioner. In *Sreeramulu* v. *Kristnamma* [2] Bhashyam Iyengar, J., held that the starting point for the period of limitation in such suits was the date of adoption (see head-note). This conclusion would seem a little inconsistent with his conclusion on the other point that arose. It was sufficient for the purpose of that case to hold that the suit was not barred by limitation, and the learned Judge's view upon this point must therefore be treated only as alternative to the view expressed as to the adopted son's right of suit. At the bottom of page 146 he observes that if the suit to recover property improperly alienated were maintainable during the widow's life-time, the period of limitation should be computed from the date of adoption the article applicable being Art. 144; but at the top of page 155 he observes that if the suit were brought after the widow's death Art. 141 would be applicable and the period of 12 years must be reckoned from the date of her death. It seems unreasonable to suppose that different articles of limitation should be applied according to the circumstances of the particular case. Evidently the learned Judge felt the difficulty of applying the articles of the Limitation Act to his conclusion upon the other point. The case of *Subbamma* v. *Subramanyam* [3], to which one of us was party was a case of surrender by a widow in favour of a reversioner, and it was held that it merely had the effect of accelerating the succession. It seems anomalous that a reversioner who succeeds by reason of widow's surrender of her life-interest should be at once enabled to recover the properties of the last male owner which have been improperly

1. (1889) I. L. R. 13 M. 512. 2. (1902) I. L. R. 26 M. 143=12 M. L. J. 197.
3. (1915) 30 M. L. J. 260.

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alienated by the widow, while an adopted son's remedy should be postponed till the widow's death. It is clear that an adopted son's right is higher than that of a mere reversioner whose right of action is limited by Art. 141. If adoption divests the widow's estate as the adopted son derives his right to sue through his father, can it be held that it does not divest the estate of alienees from the widow? I am not much impressed by considerations as to the inequity caused to purchasers from a widow whose calculations as to their prospects of enjoyment during the widow's life are liable to be disturbed by a subsequent adoption. The length of a widow's life is in any case a matter of uncertainty and speculation and persons who take property from limited owners without proper consideration do not deserve much sympathy. The sooner that the validity of such alienation is challenged in a Court of Law the better the position in which each side will find itself to adduce evidence as to the necessity for the transaction. Sufficient has been said in the full discussion in *Ramakrishna* v. *Tripurabai* [1] to show that the correctness of the Madras decision based upon the opinion of Bhashyam Iyengar, J. is open to question. I am of opinion that the Bombay decision represents the correct view of the law, and that a reference should be made to a Full Bench on the question whether an adopted son who has been adopted by a widow acting under the authority of her husband, can, during the widow's life-time, set aside the alienations made, not for necessary purpose before he was adopted and recover the property so alienated.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar*, vakils for the Appellant.

K. S. Ganesa Aiyar, vakil for the 2nd Respondent.

The Court expressed the following

Wallis, C. J.

Opinion:—*Wallis, C. J.*:—This reference which was argued before the long vacation raises a question of considerable difficulty which has given rise to much difference of opinion. On the one hand we have the judgment of Davies and Bhashyam Iyengar, JJ., in *Sreeramulu* v. *Krishnamma* [2], which is supported by Sadasiva Aiyar, J. in the order of reference. On the other hand we have the current of Bombay decisions ending with *Ramakrishna* v. *Tripura Bai* [3], with which Spencer, J., agrees.

1. (1908) I. L. R. 33 B. 88.
2. (1902) I. L. R. 26 M. 143=12 M. L. J. 197.

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With reference to the decisions of the Privy Council which have been cited on either side, I may say at once that I do not consider *Bamundoss Mookerjea* v. *Mussamut Tarinee* [1], and *Moniram Kolita* v. *Kerrikolitany* [2], as of any assistance because the point now in question did not in any way arise for consideration by their Lordships and was not considered by them. As regards the first case it had been held by the Bengal Sudder Dewani Adawlat in *Ranee Krishnamonee* v. *Rajah Oodwunt Singh* [3] that an alienation for necessary purposes made by a widow before adoption could not be questioned by the adopted son. This was all that was decided and that the head-note seems to go far beyond the decision. The judgment no doubt proceeded on the view that the alienation would not have been binding at all upon the adopted son, if it had not been for a necessary purpose, but the point really did not arise. In the course of this case a pundit expressed the somewhat extravagant opinion that a widow who had a power of adoption but had not yet exercised it was in the position of a *femme enciente*, and more than twenty years later the right of such a widow to the possession and enjoyment of the estate left by her husband was questioned on the strength of this opinion in *Bamundoss Mookerjea* v. *Mussamut Tarinee* [1]. The Sudder Dewani in 1850 overruled this contention in an elaborate judgment, which is set out at page 177 etc., of Moore's report, in which they pointed out that the decision in *Ranee Krishnamonee* v. *Rajah Oodwant Singh* [3] was no authority for such a proposition and observed, it seems to me, *obiter*, "In that case the son who was adopted became the undoubted heir; and it was of course the correct doctrine that no sale by a widow who possesses only a very restricted life interest in the estate, could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances of strict necessity."

Though their Lordships expressed their agreement with the principles laid down in the judgment of the Sudder Court and their entire concurrence in it, it seems to me to be going too far to regard them as having adopted as their own the *obiter dictum* of the Sudder Court on a question which did not arise. More weight attaches to the observation of their Lordships in the

1. (1858) 7 M. I. A. 169. 2. (1880) L. R. 7 I. A. 115=I. L. R. 5 C. 776.
3. (1824) 3 S. D. Ad. Rep. 228.

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well-known case in *The Collector of Madura* v. *Moottoo Ramalinga Sethupathy* [1] that "the rights of an adopted son are not prejudiced by any unauthorized alienation by the widow which precedes the adoption," but this observation again was purely *obiter*. On the other hand I am unable to agree with Bhashyam Iyengar, J. in regarding the observation of their Lordships in *Moniram Kolita* v. *Kerrikolitany* [2] as direct authority the other way. In considering the question whether the well-known texts about the widow keeping unsullied the bed of her lord required them to hold that her estate was forfeited by an act of unchastity committed after succession to the estate, their Lordships observed that, if it were so held, a purchaser or mortgagee from her would lose his estate in consequence of an act of unchastity committed by her prior to the sale or mortgage. The implication that in such a state of the law mortgages and alienations made by the widow before the act of unchastity would remain unaffected appears somewhat far-fetched, even if it be assumed for the moment that the same considerations would be applicable in the case of adoption as in the case of unchastity.

The more recent decision of their Lordships in *Bonomali Roy* v. *Jagat Chandra Bhowmic*, [3] is, however, much more in point. The alienation in that case was said to have been made in 1837 by the widow's mother-in-law acting on her behalf. The widow subsequently in 1846 adopted a son who attained majority in 1856. The widow having died in 1894 the adopted son's representative sued for possession in 1897. The present contention that an alienation by a widow enures for her life-time and is not divested by a subsequent adoption does not appear to have been raised for the plaintiff, the argument being that under the dispositions of the original owner the mother-in-law had the power to alienate the property for the term of the widow's life. Their Lordships however appear to have held expressly that the adopted boy's cause of action for the recovery of the alienated property arose on the date of his adoption, and that time began to run against him in 1856 on his attaining majority, and that the suit became barred in 12 years under Reg. II of 1803 and Act XIV of 1859.

This decision which is in accordance with the decisions of the Bombay Court and in accordance with their Lordships' dictum in

1. (1868) 12 M.I.A. 397 at p. 443 2. (1880) L R. 7 I.A. 115=I.L.R. 5 C. 776.
3. (1904) L. R. 32 I. A. 80 : I. L. R. 32 C. 669.

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The Collector of Madura v. *Mootoo Ramalinga Sethupathy* [1] is later than the decision of this Court in *Sreeramulu* v. *Kristnamma* [2] and, so long as it stands unexplained, I feel bound to follow it.

At the same time I feel considerable reluctance in differing from the judgment of Bhashyam Iyengar, J., in *Sreeramulu* v. *Krishnamma* [2] and the opinion of Sadasiva Aiyar, J. one of the referring Judges, because I think there is much to be said for the view taken by them that in the present state of the Hindu Law a Hindu widow, who, it is now well-settled, has full powers of disposition over the income and accumulations of her widow's estate, should not be permitted, when in the exercise of such powers of disposition she has alienated for consideration her interest in whole or in part, to abridge the interest which she has parted with and derogate from her own grant by the subsequent exercise of a power of adoption which she is under no legal duty to exercise. It is well settled that a widow who has been authorised to adopt is at full liberty to adopt or not as she pleases and cannot be compelled by law to do so. Whether she is under a moral duty to adopt seems to me to be a matter for her own conscience, especially in these days when it is certainly open to question whether the old views as to the religious necessity of adoption to a sonless man are so universally strongly held and whether the temporal inconveniences attending it are not more fully realised. Moreover, to hold that the adopted son takes subject to the widow's prior alienations for the duration of her life would not interfere with the exercise of her powers of adoption unless the alienations were so considerable as to deter the boy's parents from giving him in adoption, and this I think is a consideration which should be regarded by the widow at the time of the alienation.

It has been held by this Court in *Subbamma* v. *Subrahmanyam* [3] that a widow cannot by surrendering her interest in the estate to the next reversioner deprive prior alienees for consideration from her of their right to enjoy the alienated property during her lifetime, and I think there is much to be said for applying the same rule to adoptions. I do not pursue the question further, because in the present state of the authorities and especially in deference to the dictum in *The Collector of Madura* v. *Mootoo Ramalinga Sethupathy* [1] and the decision in *Bonomali*

1. (1868) 12 M. I. A. 397 at 443. 2 (1902) I. L. R. 26 M. 143.
3. (1915) 30 M. L. J. 260.

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Roy v. *Jagat Chandra Bhowmick* [1]. I feel bound to answer the reference in the affirmative.

Oldfield, J. :—The question referred is whether a son, adopted by a Hindu widow under her husband's authority, can during her lifetime recover property alienated by her for no necessary purpose before the adoption was made. In answering it in the affirmative, I confine myself to what, with all respect, seems to me only safe ground of decision in such cases, the current of judicial authority. For of the other grounds relied on, it is not clear on which side the weight of the argument from inconvenience would preponderate, if the uncertainty of the law authorised its consideration: and it is useless to recur to the very general wording of ancient texts, which have been dealt with frequently by the Courts.

It will facilitate the application of the authorities and define the issue before us, if the first citation is from the decision of this Court, which has occasioned the reference and from which we are asked to dissent, *Sreeramulu* v. *Krishnamma* [2]. Its foundation, as I understand it, is the statement that "a Hindu widow has an absolute right to the fullest beneficial interest in her husband's property for her life and that she has a personal interest therein, which she can exercise at her will and pleasure by giving or transferring the estate to another for her own life or, speaking more accurately, for the term of her widowhood": and no doubt this statement gives with sufficient accuracy the general effect of the nine cases and of Act XV of 1856, which are referred to as supporting it. But it is useless, as justified by them, for the present purpose, because they relate only to cases of the widow's death or re-marriage, in which her widowhood and her estate ended together and the distinction between the duration of the one and the other would not have affected the determination of the estate she had conveyed. It is otherwise, when the making of an adoption is in question. For there is no dispute but that it terminates the widow's estate, although her widowhood continues. *Dhurm Das Pandey* v. *Musamat Shama Soondri Debiah* [3]. If therefore the distinction proposed is valid; if, that is, the widow's power is correctly defined as being to dispose only of a widow's estate subject to all its legal incidents, not of an estate for the term of her widowhood, the authorities referred to are inconclusive and the statement of law founded on them must be rejected for the present purpose.

1. (1904) I. L. R. 32 C. 669. 2. (1902) I. L. R. 26 M. 143.
3. (1843) 3 M. I A. 229 at p. 242.

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This distinction and the first of these views can in my opinion be sufficiently supported by reference to the principle enunciated in general terms in *Dhurm Das Pandey* v. *Mussamat Shama Soondari Debiah* [1]. For in view of those terms I cannot follow the suggestions that the widow can by unnecessary alienations diminish even temporarily the estate, which the son inherits at once on his adoption, and that the making of an adoption is to be excluded from the contingencies, which, like the widow's death or remarriage, her alienee must face as determining his rights, if necessity for the alienation cannot be proved. Before however turning to the arguments, by which those suggestions are supported (and they are in fact identical with those employed in *Sreeramulu* v. *Krishnamma* [2]) I deal with the decisions, which favour the contrary conclusion.

It is not worth while to consider in detail those, which deal with the widow's powers generally and without reference to the effect of an adoption on their exercise, because, although some of them refer explicitly to her alienations as of a widow's estate, others refer to them as of an estate for her widowhood: and, as already observed, the maintenance of the distinction between these descriptions would have had no effect on the conclusion. There are however three cases in which an adoption was in question; and they are in my opinion decisive in favour of the adopted son's immediate right to recover from the alienee. In *Bamundoss Mookerjee* v. *Mussamut Tarinee* [3] the Privy Council adopted comprehensively the judgment of the Sudder Dewani Adalat under appeal before it, endorsing the following reference to another case, *Ranee Kishenmunee* v. *Rajah Oodwunt Singh* [4]:—"The point was whether a retrospective right could be claimed by a son, after he had been adopted, so as to bar a sale made by his adoptive mother previous to his adoption to the injury of his rights, at that time contingent and eventual, but which actually accrued to him upon his adoption. In that case the son, when adopted, became the undoubted heir; and it was of course the correct doctrine that no sale, made by the widow, who possesses only a very restricted life interest, could hold good against any ultimate heir, whether an adopted son or otherwise unless under circumstances of strict necessity." This recognition of the adopted son's right was, though the fact is not expressly referred to in *Bamundoss Mookerjee* v. *Mussamat Tarinee*, [3] accorded, as reference to the Sudder Dewani

1. (1843) 3 M. I. A. 242.
2. (1902) I. L. R. 26 M. 143.
3. (1858) 7 M. I. A. 169.
4. (1824) 3 S. D. A. Rep. 228.

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Adalat Report shows, in a suit instituted during the lifetime of the widow. Next there is a similar statement of the law in *Collector of Madura* v. *Mootoo Ramalinga Sethupathi* [1] made explicitly in the judgment of the Privy Council, though no doubt merely *obiter*. These two authorities are of course only indirect, the first being important mainly as evidence of an early recognition of the principle it involves. But to the remaining case, *Bonomali Roy* v. *Jagat Chandra Bhowmick* [2] no such objection is available, since the question dealt with in the judgment of the Privy Council was whether the suit brought by a person claiming under the adopted son was in time and it was held that, if the latter had a cause of action, it arose on the date of his adoption. The fact that the law of limitation then in force was Act XIV of 1859 is no ground of distinction from the present case, since the question was of the starting point for, not the period of, limitation; and, since a reversioner's cause of action arose under the earlier Act, as it does now, on the widow's death, the distinction in favour of the adopted son is marked clearly. *Sambasiva* v. *Raghava* [3] and in review, 1 M. L. J. 392. These decisions of the Privy Council are accordingly irreconcileable with *Sreeramulu* v. *Krishnamma*. It must be added that the last mentioned case has been dissented from by the only other High Court, which has considered it, *Ramakrishna* v. *Tripura Bai* [4].

It remains to deal shortly with the other considerations, by which the decision in *Sreeramulu* v. *Krishnamma* [5] has been supported. They include first an argument from the explanation given in *Lakshman Rau* v. *Lakshmi Ammal* [6] of the decision in *Bamundoss Mookerjee* v. *Mussamat Tarinee* [7] already referred to, in which it seems to me (with all respect) that the connection in which that explanation was given is overlooked. The Court was dealing with a point very similar to the main point dealt with in the earlier case, the effect on the widow's power of alienation of her possession of an authority to adopt; and it therefore had no occasion, especially as it held that the alienation in question before it was made for a necessary purpose, to define an adopted son's rights, to decide the date from which he could assert them or to consider the portion of the judgment extracted above, in

1. (1868) 12 M. I. A. 397 at 443.
2. (1904) I. L. R. 32 C. 669.
3. (1889) I. L. R. 13 M. 512.
4. (1908) I. L. R. 33 B. 88.
5. (1902) I. L. R. 26 M. 143.
6. (1881) I. L. R. 4 M. 160.
7. (1858) 7 M. I. A. 169.

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which *Ranee Krishnamonee* v. *Rajah Oodwunt Singh* [1] is referred to. The reference, which follows in *Sreeramulu* v. *Kristnamma* [2] to the decision in *Ganapathi Aiyar* v. *Savitriammal* [3] appears to disregard the fact that no alienation by the widow was in question in the latter case, her action, as the court found, consisting only in the creation of documentary evidence of the oral devise by her husband, under which the alienee claimed; and therefore nothing at present material was decided. Next an extract from the judgment in *Moniram* v. *Kerrykolitany* [4] is relied on as showing that the validity of a widow's alienation can be affected only by her conduct prior to it and not, it is to be inferred, by her subsequently making an adoption; but the *dictum* in question, which no doubt actually mentions only prior conduct, is not statedly applicable to it alone and occurs in the course of a hypothetical argument from inconvenience, in connection with which any conclusion *ex silentio* would be unsafe. Lastly it is argued that Art. 125, Sch. II of the Limitation Act, 1908 impliedly postpones the right to recover possession from a widow's alienee until after her death or remarriage. The answer is firstly that substantive rights under Hindu Law cannot be regarded as curtailed by mere implication from a provision relating to procedure; and secondly that an adopted son is not and has not been shown to be on the same footing as a reversioner and that his suit for possession will be covered by Art. 144.

The arguments, by which the conclusion in *Sreeramulu* v. *Krishnamma* [2] is supported, failing, I would dissent from the decision in that case and answer the question referred in the affirmative.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J.—The question referred to us for decision is whether an adopted son who has been adopted by a widow acting under the authority of her husband can during the widow's life-time set aside alienations made not for necessary purposes before he was adopted and recover the property so alienated.

It has now been well settled that an adopted son has all the rights of a natural son in his adoptive father's estate. He acquires by right of adoption an interest in his adoptive father's ancestral property and the same right to question his alienations as the

1. (1823) 3 S. D. A. 228.
2. (1902) I. L. R. 26 M. 143.
3. (1897) I. L. R. 21 M. 10.
4. (1880) L. R. 7 I. A. 115.

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aurasa son. He succeeds to collaterals of his adoptive father and holds the same position as the natural son unless his right has been specially curtailed by express texts.

When a widow adopts a son under authority from her husband the son adopted succeeds to the estate of his adoptive father by right of inheritance just in the same way as the natural born (*aurasa*) son. The estate which the widow had between the date of her husband's death and the date of the adoption *is at once divested* and becomes vested in him not as succeeding to the widow making the adoption but to the deceased person in pursuance of whose authority the adoption was made. Though his rights arise only from the date of his adoption they are paramount to those of the widow who is at once relegated to the position of a female member of the family entitled only to maintenance and residence in the family house. The position of such an adopted son is clearly and accurately set out by Farran, J. in *Moro Narayan Joshi* v. *Balaji Raghunath*,[1] where he observes as follows :—"Now an adopted son claims from and through his adoptive father. His adoption however does not relate back to the death of his adoptive father (*Bamundoss Mookerjea* v. *Mussamut Tarinee*)[2]. He comes in bound by such acts of the widow as would bind the natural heirs of the husband after her and entitled to set aside (in the absence at all events of stipulations to the contrary) such unauthorised alienation of the widow as they succeeding upon her death would be entitled to set aside. The only difference between him and other full-heirs of the husband for the purpose I am considering seems to be that his rights spring into existence the moment of his adoption and displace the rights of the widow while the rights of other reversioners await the determination of the widow's estate by her death."

In *Ranee Krishnamonee* v. *Rajah Oodwunt Singh*[3] it was held that a sale made by a widow to the prejudice of her late husband's property before the adoption made by her under authority given by her husband will not be valid as against the adopted son unless made under circumstances of necessity and that he was entitled to possession. This case was referred to by the Calcutta Sudder Court in *Bamundoss Mookerjee* v. *Mussumat Tarinee*[2] which was affirmed by the Privy Council, *Bamundoss*

1. (1894) I. L. R. 19 B. 809. 2. (1858) 7 M. I.-A. 169.
3. (1824) 3 Macnaughten's S. D. A. Reports, 228.

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Mookerjee and *Mussumut Raj* v. *Mussumut Tarinee* [1]. Referring to *Rani Kishunmonee's* case [2] the Judge of the Sudder Court observed as follows; "The point in that suit was whether a retrospective right could be claimed by a son after he had been adopted so as to bar a sale made by his adoptive mother previous to his adoption to the injury of the rights at that time contingent and eventual but which actually accrued to him upon his adoption. In that case the son when adopted became the undoubted heir, and it was of course the correct doctrine that no sale made by a widow who possesses only a very restricted life interest in the estate would have been good against any ultimate heir whether an adopted son or otherwise unless made under circumstances of strict necessity". Their Lordships of the Privy Council simply confirmed the judgment of the Sudder Court with the remark that they entirely agreed in the principles laid down in the judgment which was in their opinion most able and elaborate, *Bamundoss Mookerjee* v. *Musst. Tarinee* [3]. In *The Collector of Madura* v. *Muthu Ramalinga Setupati* [4] their Lordships distinctly lay down that the rights of an adopted son are not prejudiced by any unauthorised alienation by the widow which precedes the adoption.

In *Lakshmana Rau* v. *Lakshmi Ammal*[5] the decision of the Privy Council above referred to was considered and it was held the decision established that during the period of her husband's death and the adoption, only such acts as are authorised and would be effective against reversioners, would bind the sons taken in adoption and that acts in excess of her powers under Hindu Law may be challenged by the adopted son.

The decision of the Privy Council, *Bamundoss Mookerjee* v. *Mussamut Tarinee* [1], was also considered by the Bombay High Court in *Nathaji Krishnaji* v. *Hari Jogoji* [6] where relying on the authority of the case, the Court upheld the right of the adopted son to set aside unauthorised alienation made by a Hindu widow between the date of her husband's death and the adoption made in pursuance of authority given by him. So far as the Bombay High Court is concerned a series of well-considered decisions clearly establish the adopted son's right to recover immediate possession.

1. (1858) 7 M I.A. 169.
2. (1823) 3 Macnaughten S.D.A. R,228.
3. (1858) 7 M. I.A. at p. 206.
4. (1868) 12 M. I. A. 397.
5. (1881) I. L. R. 4 M. 160.
6. (1871) 8 Bom. H. C. R. A. C. J.

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I need only refer to *Lakshman* v. *Radhabai* [1], *Narayan Joshi* v. *Balaji Raghunath* [2], and *Ramakrishna* v. *Tripura Bai* [3].

Though the rights of the adopted son commence only from the date of his adoption it is undoubted law that he divests the estate of the widow making the adoption and her co-widows and the interest (wholly or partially) of all persons in possession of the property of his adoptive father to whom he would have a preferential title if he had been in existence as adopted son at his adoptive father's death. In *Dhurm Das Pandey* v. *Mussammut Shama Soondri Debia* [4] their Lordships of the Privy Council observe (p. 243) " an objection has been made that pending the suit an act of adoption was executed by the respondent whereby the whole property was divested from the mother and vested in the adopted son. Now upon the authorities there can be no doubt that that is the result of an act of adoption because the property is in the widow from the death of the husband till the power of adoption is exercised. Then that adoption divests it from the widow and vests it in the adopted son". The authorities in my opinion clearly establish the view that an adoption puts an end to the widow's estate as fully and effectually as her death.

Such being the rights of an adopted son who on adoption claims under a title paramount to that of the widow and divests her of the estate she held, the question is whether the widow who alienates properties *without any legal necessity* and the alienee from such widow have any rights or equities which would entitle the alienee to possession as against the adopted son. I find it difficult to see how the purchaser from a Hindu widow who has only limited powers of alienation and who alienates property without any necessity or justifying circumstances such as would bind the reversioners after her death or re-marriage can invoke any principles of Hindu Law or any equity to prevent the adopted son (whose adoption has put an end to the widow's estate just as effectively as her death or remarriage) from claiming possession of properties which were alienated. I can see very little equity in postponing the adopted son to a purchaser from the widow who contrary to the principles of Hindu Law and the directions of Smrithi writers alienates the estate for no necessity. Whatever may be the nature of the estate taken by a Hindu widow succeeding to her sonless husband it is clear that her powers of alienation are

1. (1887) I. L. R. 11 B. 609.
2. (1894) I. L. R. 19 B. 809.
3. (1908) I. L. R. 33 B. 88.
4. (1843) 3 M. I. A. 229.

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restricted. As pointed out by the Privy Council in *The Collector of Masulipatam* v. *Cavaly Venkatanarayanappa* [1] the estate she takes is a qualified proprietorship with powers of alienation for purely worldly or secular purposes only where there is justifying necessity *and the restrictions to the powers of alienation are inseparable from her estate.* So far as the texts and Smrithis go they do not countenance the view that a widow can make a valid alienation of any kind or to any extent without justifying necessity and no distinction is drawn as to alienations purporting to be for her life-time only. The text of Katyayana is specific and enjoins her to keep the bed of her lord unsullied to enjoy with moderation his estate and pass it on to his heirs. Brihaspathi observes that she has not got property therein to the extent of gift, mortgage or sale except for spiritual or religious purposes. The restraints on powers of alienation by a Hindu widow are based as pointed out by their Lordships of the Privy Council in *The Collector of Masulipatam* v. *Cavaly Venkatanarayanappa* [1] (at p. 550) not merely for the protection of the material interests of her husband's relations but by reason of the opinion of all the Smrithi writers as to the necessity of a Hindu widow being under the advice and protection of her husband's elderly relations. I can find nothing in any of the Smrithis or commentaries to warrant the view that they empower a Hindu widow to do what she likes with her limited estate. On the contrary the limitations imposed and the reasons given for the imposition thereof show to my mind clearly that such an idea was repugnant to the minds of the Smrithi writers. So far as judicial decisions go all they decide is that a Hindu widow may deal with her interest in the property inherited at the pleasure *so long as such dealing enures for the term she is entitled to the estate as widow succeeding to her sonless husband and no prejudice to the reversion is caused thereby.* (See *Muthu Naicken* v. *Srinivasa Iyengar*). [2] This is chiefly due to the fact that there is in existence no person who can demand *present* possession of the estate (the reversionary heirs having only a *spes successionis*) and the widow is estopped from contesting the validity of her own grant. The title of the alienee is therefore incapable of being defeated by any superior title arising during the widow's life.

That the estate of the widow is not an indefeasible life estate but only an estate *durante viduitate* is clear. It is not disputed

1. (1861) 8 M. I. A. 529. 2. (1911) 1 M. W. N. 82.

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that the adopted son would divest the widow of all the properties which remain unalienated at the time of the adoption and it is well settled law that her remarriage will have the same effect so far as the reversioners of her husband are concerned. It is difficult to see how the widow can under these circumstances be said to have an absolute indefeasible estate in the property inherited by her from her husband during the term of her natural life. If she has not got such an estate it is still more difficult to see how any alienation by her can last a moment longer than the cessation of the widow's estate either by death, remarriage or an adoption which certainly divests her as completely as if her husband had left a male issue. To speak of any portion of the estate which has been alienated by her without any legal necessity as having been "lawfully severed" for the period of her natural life is with all respect unsupported by any texts of the Hindu Law or any principle of Hindu Jurisprudence. It has not been suggested by any body that a *gift* of the whole or any part of the estate would if made prior to the adoption disentitle the son to claim possession from the donor. As pointed by Chandavarkar, J. in *Ramakrishna* v. *Tripura Bai* [1] the doctrine enunciated in *Sreeramulu* v. *Krishnamma* [2] would be equally applicable if the widow alienated the *whole of the properties* before adopting a son and yet it can hardly be contended that such a result was ever contemplated by Smrithi writers.

There seems to me to be no real analogy between the position of a father to whom a son is born after an alienation and a Hindu widow who adopts under authority of her husband after making an unauthorised alienation. Though the fiction of constructive pregnancy through permission to adopt has been exploded by a series of decisions, the adopted son on his adoption becomes the son and heir of his father and the adoption has retrospective effect in so far as it divests wholly or partially the estate of all persons whom he would have either excluded from the inheritance or shared with. The estates held by a sonless father and a Hindu widow with authority to adopt are essentially different in nature and extent, and the difference has been pointed out by Chandavarkar, J. in *Ramakrishna* v. *Tripura Bai* [1] and by Collins, C. J. and Handley, J. in *Jagannadha* v. *Papamma* [3]. So far as reversioners are con-

1. (1908) I. L. R. 33 Bom. 88. 2. (1902) I. L. R. 26 Mad. 143.
3. (1892) I. L. R. 16 M. 400 p. 401=3 M. L. J. 193.

cerned their position is quite different from that of an adopted son. Till the death of the widow or the termination of her estate it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband as the property under Hindu law descends to those who would have been heirs to the husband if he had lived up to and died at the moment of her death. When however the widow makes a valid adoption a son is by fiction of law born to her husband the moment she adopts and he by virtue of his sonship succeeds immediately to his father's property as effectually as if he was a posthumous son.

The decision of the Privy Council in *Bonamali Roy* v. *Jagat Chandra Bhowmick* [1] supports the view that the adopted son is entitled to immediate possession of property wrongfully alienated by a widow before his adoption. The facts of the case are fully set out at pages 669 to 671 of the report and the judgment of the High Court appears on pages 672 to 674 of the report. It will be seen that the adopted son sued to set aside a perpetual lease granted between the date of the death of his adoptive father and his adoption and recover possession. Various contentions were put forward which are fully dealt with in the judgment of the High Court. One of them was that the lease was executed by the mother-in-law of the widow acting as her guardian and that as the lease was not repudiated by her it must be taken to be the act of the widow and consequently limitation began to run as against the adopted son only from the death of the widow. If the view taken in *Sreeramulu* v. *Krishnamma* [2] namely, that the cause of action for possession arose only on the widow's death were correct, it is clear that the suit would not have become barred at the date of its institution, assuming that the lease was one executed by the widow's guardian on her behalf and ratified by her. The following passage in the judgment of their Lordships of the Privy Council shows that they were of opinion that the right to possession arose immediately on adoption. "On the most favourable view for the appellant she (Hemlate the mother-in-law of the widow making the adoption) granted the putni as manager of the estate for Brajeswari (the widow who adopted the plaintiff) the then legal owner. If the putni was void the period of limitation ran from the date on which it was granted under Regulation II of 1803 as amended by Regulation II of 1805

1. (1905) I. L. R 32 Cal. 669. 2. (1902) I. L. R. 26 Mad. 143

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which was then in force. But if it was voidable only by Brajewari's successsor the right of action arose on the adoption of Banwari Lall and time would begin to run against him from the date when he attained majority in 1856. Under either Regulation II of 1803 or Act XIV of 1859 time ran from the date when the cause of action arose." It was contended by Mr. Ganesa Aiyar in the course of his able argument that the question as to the right of the adopted son to set aside the alienation of his adoptive mother did not arise for determination as the Courts were only concerned with the lease granted by her mother-in-law acting under an *anumati patra* granted by adopting widow's father-in-law. A reference to the judgment of the High Court which deals with every possible alternative case or contention and the judgment of the Privy Council which deals with the point of view most favourable to the plaintiff and treats the lease as one by the widow making the adoption shows that the aspect of the case now before us was considered. It is no doubt true that the decision in *Sreeramulu* v. *Krishnamma* [1] was not cited at the bar or considered by their Lordships but this is hardly a ground for over-looking what is in my opinion the plain result of the decision of their Lordships. In *Sivagnanam Servaigar* v. *Ramaswami Chetti* [2] Sir Arnold White, C. J. observed that the decision in *Sreeramulu* v. *Krishnamma*[1] does not seem to be reconcilable with the decision of the Privy Council and Spencer, J. is of the same opinion in the order of reference.

In *Amrita Lal Bagchi* v. *Jatindra Nath Chowdry* [3] which was a suit to set aside an alienation by a widow who subsequently made an adoption it was held following *Latchman* v. *Radhabhai* [4], *Nathagi Krishnaji* v. *Hari Jagoji* [5], *Moro Narayan Joshi* v. *Balaji Raghunath* [6], and *Bijoy Gopal Mukerji* v. *Nil Ratan Mukerji* [7] that the cause of action which an adopted son has to set aside an alienation accrued as soon as he is adopted and that as he was barred, those who came after him were likewise barred even though the suit was within 12 years from the date of the widow making the alienation. The view taken was that as the adopted son divests the estate of the widow and becomes entitled to possession immediately he is adopted and not on her death,

1. (1902) I. L. R. 26 M. 143.
2. (1911) 22 M. L. J. 85.
3. (1904) I.L.R. 32 Cal. 165.
4. (1887) I. L. R. 11 Bom. 609.
5. (1871) 8 Bom. H. C. R. 167.
6. (1894) I. L. R. 19 Bom. 809.
7. (1903) I. L. R. 30 Cal. 990

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Art. 141 of the Limitation Act has no application as it only provides for cases when the person suing is entitled to possession on the death of the female. In *Kancharla Venkatraman* v. *Koganti Venkatramiah* [1] Wallis, C. J. and Seshagiri Aiyar, J. following *Moro Narayan Joshi* v. *Balaji Raghunath* [2], *Hari* v. *Waman* [3], *Harek Chand* v. *Bejoy Chand Mahtob* [4] and the view taken in *Sreeramulu* v. *Krishnamma* [5] as to the article of the Limitation Act applicable, held that the adopted son is governed by Art. 144 and has 12 years from the date of his adoption. The facts as appear on the judgment show that the widow before adopting the plaintiff entered into a partition with her mother-in-law which the learned Judges agree in holding was not binding on the adopted son. If the learned Judges intended to adopt the view of Bashyam Iyengar, J. in *Sreeramulu* v. *Krishnamma* [5] on the other question and to hold with him that the adopted son had no right to recover possession of property alienated by the widow prior to the adoption till the death of the widow it is difficult to see why Article 141 of the Second Schedule to the Limitation Act would not apply and exclude Article 144 which is only a residuary Article as quoad the property alienated the adopted son would be in the same position as any other Hindu entitled to the possession of immoveable property on the death of a Hindu female. Seshagiri Aiyar, J. in dealing with *Runchordas* v. *Parvatibai* [6], observes: "the principle of the decision is that until the plaintiff's right to immediate possession accrues his right to possession is not barred. In the case of a reversion the cause of action will accrue on the death of the widow; in the case of an adopted son, on his adoption" and the observations suggest that he was not in agreement with the view of Bashyam Iyengar, J. that the right to possession in case of alienation prior to the adoption accrues only on the death of the widow.

Reference has been made to cases where it has been held that a reversioner to whom the widow surrenders the estate (and thereby accelerates the succession) cannot sue to set aside the alienation made by her till she dies. These cases have in my opinion no bearing or application to cases of adoption by the widow. The whole doctrine of surrender and consequent acceleration of the estate of the reversioners has no basis in Hindu Smritis but has

1. (1914) 27 M. L. J. 569
2. (1894) I. L. R. 19 Bom. 809.
3. (1901) 2 Bom. L.R. 411
4. (1905) 9 Cal. W. N. 795
5. (1902) I. L. R. 26 Mad. 143.
6. (1899) I. L. R. 23 Bom. 725.

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been evolved by courts of justice on general principles of jurisprudence. An anticipation of interest involved by the theory of relinquishment or the defeasance of an ulterior interest by the intermediate acts on the part of the widow are hardly contemplated by the Hindu law-givers. It is clear that the surrender by the widow and the acceptance of the estate by the reversioner are purely matters of contract. The widow is not bound to surrender the estate nor is the reversioner bound to accept it except on terms which would apply to any other transfer of immoveable property so far as prior alienees are concerned and conditions which courts will impose on considerations of justice, equity and good conscience. To a voluntary relinquishment by the widow based on no considerations of duty to her husband or his spiritual benefit courts have very properly refused to annex the right to defeat alienations made by her which would enure longer but for her voluntary act. As between the widow, the prior alienee, and the reversioners claiming title under a subsequent surrender the alienee has a clear equity to retain possession and the fruits of his purchase till at least the widow dies. But what equity is there in favour of a person who purchases property from a Hindu widow knowing that there is absolutely no necessity for the sale and that she has authority to adopt which she could exercise at any time. It is his clear duty to enquire as to whether she has authority to adopt, just as it is the duty of a person dealing with a qualified owner to enquire into the existence of necessity for the alienation. It is no doubt true that the power to adopt has no legal effect till it is actually exercised but the adoption made in pursuance does not put the adopted son in the same position as a volunteer. Having regard to the spiritual importance attached by Hindu law-givers to sonship and the care and anxiety displayed by them to provide for a substitute in case a son is not born, there can be little doubt that a Hindu widow who has been solemnly enjoined by her husband to perform (what was in his eyes at least) the sacred duty of adopting a son so as to continue his name and lineage and to enjoy and transmit the property to his descendants is under a strong moral obligation sanctioned by the dictates of duty and the pieties of human life to carry out his wishes. It is true she cannot be compelled to adopt but this is due not to the unimportance of the duty but to the absence of any legal machinery by which she can be compelled to perform so personal an act. Self-interest often

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deters her from performing a duty which according to all Hindu law-givers and the views and sentiment of the great majority of Hindus is of paramount importance to the spiritual needs of her husband and his ancestors but the duty if performed is far from a purely voluntary act on her part but on the contrary one which she was bound to perform by all the dictates of duty and morality as understood by Hindu Law and sentiment. It has been argued that it would be a hardship on the widow to terminate the alienation made by her as it would place a difficulty in the way of her dealing with the estate. I have already shown that the theory that she could do what she pleases with the estate during her lifetime finds no sanction in Hindu Law. From the point of view of the widow's interest I should think that any check on her power of squandering her husband's estate or alienating it without any necessity is for her benefit having regard to the ignorance of the vast majority of Hindu females. In an age when legislation has been directed towards and is being called for to protect ignorant people against their own imprudent acts, I think we can well preserve the rules of Hindu sages and law-givers who recognising the limitations of Hindu females and the temptations afforded by poverty have secured to them protection against their own improvidence. It is difficult to see why a purchaser who purchases without any necessity for the sale and who knows that death or remarriage would put an end to her rights should be encouraged in any "reasonable expectation" that the widow would violate a clear moral duty for her benefit.

Cases relating to agreements between the widow and the father or guardian of the adopted son or the adopted son himself if he is of age, whereby the rights of the adopted son are postponed or put on end to have also no bearing on the question. Where an adopted son is a minor the arrangement is supported on the ground that it was for his benefit and that but for the arrangement he would not have been adopted and so worse off. I doubt very much if courts would uphold an agreement which is distinctly disadvantageous to the minor. In cases where the adopted son is a major he is competent to contract so as to divest himself of rights which accrue to him under Hindu Law.

As observed by Mayne in his work on Hindu Law it would be cutting at the root of all well-recognised principles as to the status of an adopted son and the consequences of an adoption to

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hold that alienations without necessity would bind the adopted son during the widow's life-time. I feel little hesitation in following *Ramakrishna* v. *Tripurabai* 1, and answering the question referred to us in the affirmative.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction)

PRESENT :—MR. JUSTICE COUTTS TROTTER.

P. Thiruvarangiah .. *Plaintiff**

v.

D. K. Pania & Co. .. *Defendants.*

P. Thiruvarangiah v. D. K. Pania & Co.,

Sale of goods—Contract c. i f.—Goods shipped in a German ship—Out-break of war, while steamer was on voyage—Effect of war on contract—Whether buyer bound to accept goods.

Where the plaintiffs agreed to buy a certain number of cases of Belgium window glass under a c. i. f. contract and the goods were shipped at Antwerp between the 26th and the 29th of July 1914 and the war broke-out while she was on her voyage, on the 3rd August 1914 between England and Germany, but she was, after being condemned as a prize, allowed to proceed to such ports in the British Empire as she had cargo for and to discharge the cargo there, and the defendant was thus in a position to hand over the cases of glass to the plaintiff and take the price for them, in a suit for damages for the breach of the contract by the defendant, *held*, the buyer could not in such circumstances enforce the contract and judgment must be entered for the defendant. Under a c. i. f. contract for the sale of goods, there is a sale of goods by the delivery to the ultimate owner of the documents of title to the goods. Where the seller tenders to the buyer documents under a c. i. f. contract which includes a bill of lading in an enemy ship, the tender is bad, because the contract was rendered illegal as it involved a contract of affreightment with an alien enemy and similarly the buyer cannot enforce the contract against the seller.

Arnhold Karberg & Co. v. *Blythe Green, Jourdain & Co.* 2, *Arnhold Karberg & Co.* v. *Blythe Green, Jourdain & Co.* 3 followed.

Madhoram Hardeo Dass v. *G. C. Sett and B. R. Sett* 4, *Marshall and Co.* v *Naginchand Fulchand* 5, approved.

Suit for damages for breach of contract.

C. P. Ramaswami Aiyar, S. Ponnusami Aiyar and *K. Narayanaswami Aiyar* for Plaintiff.

V. V. Srinivasa Aiyangar, V. S. Govindachari and *V. S. Kallabiran Aiyangar* for Defendants.

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* C. S No. 423 of 1916. 14th August, 1917.

1. (1908) I. L. R. 33 B. 88.
2. (1915) 2 K. B. 379.
3. (1916) 1 K. B. 495.
4. (1917) 21 C. W. N. 760.
5. (1916) 18 Bom. L. R. 915.

P. Thiruvarangiah v. D. K. Pania & Co.

Coutts Trotter, J.

The Court delivered the following

Judgment:—This is an action for damages for breach of three contracts between the parties dated the 24th April, 27th April and 30th April 1914 under which the plaintiff agreed to purchase a certain number of cases of Belgium window glass. Those goods were shipped—we do not know the exact date, but as the invoices were made out on the 23rd July 1914 and the bills of exchange were dated the 29th July, the probability is that they were shipped between those dates, and it is conceded for the purpose of this case that they were shipped before the outbreak of war between Great Britain and Germany on the 3rd August. The contracts were c. i. f., c. i., Madras, and they were shipped on board a German ship the 'Spitzfels' at Antwerp. While she was on her voyage, war broke out; I am told that she was ultimately captured, and was brought to Colombo where the ship was condemned as a prize, but she was allowed to proceed to such ports in the British Empire as she had cargo consigned for and to discharge that cargo there; and arrangements were ultimately made—I do not think it is material to go in detail into what they were—whereby the Government of this country undertook to give delivery to British subjects who were entitled to receive delivery of the cargo on board the ship. The result of all that was that on the arrival of the ship in May 1916 at Madras, the defendant, had he been minded to do so, was in a position to hand over these cases of glass to the plaintiff and take the price for them. That is conceded. The question is whether he was under any obligation to do so.

There has been some discussion recently as to whether or no it would be correct to speak of a c. i. f., contract in the language of Scrutton, J. as "a sale of documents and not of goods." Bankes, L. J. in *Arnold Karberg & Co.* v. *Blythe Green, Jourdain & Co.* [1], says "I am not able to agree with that view of the contract, that it is a sale of documents relating to the goods. I prefer to look upon it as a contract for the sale of goods to be performed by the delivery of documents, and what those documents are must depend upon the terms of the contract itself." That seems to me a distinction so subtle as really to be immaterial. The point is that under a c. i. f., contract what is expected and intended to be delivered to the ultimate purchaser

1. (1916) 1 K. B. 495.

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is the documents of title to the goods. No doubt it is a sale of goods, it says so; but at the same time it is intended to be performed not by the delivery of goods but by the delivery of the documents of title of the goods. Now what are those documents? They are first, the bills of lading relating to the goods, it being the duty of the vendor under his contract to ship the goods and get the bill of lading in respect of them from the ship's agents, then there must be a policy of insurance in an approved form, and lastly there must be the invoice; and in most mercantile contracts all those documents are generally forwarded along with bills of exchange which are to be accepted or paid by the vendee in return for the other documents. What are the essentials of the bills of lading that must be tendered in order to fulfil the contract? They must, I think, be bills of lading which do not contain an illegal or unenforceable contract. That seems to me to be the effect of the decision in *Arnold Karberg & Co.* v. *Blythe Green, Jourdain & Co.*, [1] and in the court below the very instructive Judgment of Scrutton, J. in *Arnhold Karberg & Co.* v. *Blythe Green, Jourdain & Co.* [2]. That case decided that where a seller tendered to a buyer documents under a c.i.f., contract which included a bill of lading in a German ship, the tender was bad, not because the putting of the goods on board the ship was not at the time it was done perfectly in accordance with the contract, but because the event of the outbreak of war having rendered that contract illegal, to force that by way of tender on the buyer was equivalent to saying "under the terms of your contract I shall make you trade with the enemy." That is what it comes to. It has never been doubted, since it was pointed out by Willes, J., is *Esposito* v. *Bowden* [3] that to enter into a contract of affreightment with an alien enemy is trading with the enemy and on the outbreak of war such contracts become void and incapable of performance. I am content to rest this Judgment upon those general considerations and I think I should have been quite satisfied to rest it on the authority of the cases in the Court of Appeal in England, but I am fortified in the conclusion to which I have come in that this case is admittedly indistinguishable from the case of *Madhoram Hurdeo Dass* v. *G. C. Sett and B. R. Sett* [4] which is a decision of Sanderson, C.J., who is a lawyer of great experience in Commercial Courts in England and of Mookerjee, J. Although

1. (1916) 1 K. B. 495.
2. (1915), 2 K. B. 379.
3. (1857) 7 E. & B. 763.
4. (1917) 21 C. W. N. 670.

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their Judgment is not binding on me, I should naturally treat it with great respect, and I not only do so but I respectfully agree with them. Practically the same conclusion has also been come to in Bombay in a very exhaustive Judgment by Beaman, J. in *Marshall & Co.* v. *Naginchand Fulchand* [1]. I think even if I did entertain any doubt upon it, in a question of this sort it is extremely desirable that the Courts of the Empire, because commercial transactions of this kind extend all over the Empire, should speak with one voice and I should not dissent from the Judgment of the Bombay and Calcutta High Courts which I believe to be in entire agreement with the principles laid down by the English Court of Appeal. I must therefore on this ground alone give Judgment for the defendant with costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE KUMARASAMI SASTRI.

Unnamalai Ammal ... *Appellant* (Petr-Plff).*

v.

Mathan *alias* Arunachalam and another. *Respondents (Defts).*

Unnamalai Ammal v. Mathan.

Limitation Act (IX of 1908) Arts. 181 *and* 182—*Application for restitution—Article applicable.*

An application for restitution is an application for execution of a decree and is governed by Art. 182 and not by Art. 181 of the Limitation Act.

Sultan Sahib Marakayar v. *Chidambaram Chetti* [2], distinguished.

Venkayya v. *Raghavalu* [3], *Somasundaram Pillai* v. *Chokkalingam Pillai* [4], *Gapala Menon* v. *Anujan Rajah* [5], *Asutosh Goswami* v. *Upendra Prasad Mitra* [6], referred to.

Appeal from the decree of the District Court of North Arcot in Appeal Suit No. 131 of 1915 preferred against the order of the Court of the District Munsif of Tirupattur in R. E. P. No. 475 of 1914 in O. S. No. 1120 of 1903.

K. S. Ganesa Aiyar for Appellant.

K. V. Krishnaswami Aiyar for Respondents.

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* A. A. A. O. No. 77 of 1916. 20th July, 1917.

1. (1916) 18 Bom. L. R. 915.
2. (1909) I. L. R. 32 M. 136.
3. (1897) I. L. R. 20 M. 448.
4. (1917) I. L. R. 40 M. 780.
5. (1911) 22 M. L. J. 146.
6. (1916) 21 C. W. N. 564.

Unnamalai Ammal v. Mathan.

The Court delivered the following

Judgment:—The question in the appeal is whether Art. 182 or 181 of the Indian Limitation Act applies to this application which was an application for restitution of certain property in consequence of the reversal of the original decree. There is no direct decision on this point under the new Civil Procedure Code. The learned pleader for the respondent argues that though it is conceded that the application in question is an application in execution it cannot be said to be an application for execution of the decree and he says that there is authority for the distinction in a case reported in *Sultan Sahib Marakayar* v. *Chidambaram Chettiar* [1]. But what was decided in that case was that a decree having been already executed and the application being for delivery of possession, there was no question of the execution of the decree. This is a totally different case. It is conceded by the learned pleader that S. 47, C. P. Code does govern an application for restitution under the new Code. He says that it is an application relating to the execution of the decree, but it is not an application for execution of the decree. As we understand the words "an application for execution of a decree," they cannot mean anything else but an application to enforce the decree. The distinction is sought to be drawn on the ground that the application seeks to enforce what legally follows from the decree but not to enforce the terms of the decree. We do not think that this subtle distinction is sound so far as the present question is concerned. What is sought to be enforced is the legal obligation arising from the decree itself and not an independent obligation. It seems to us that we must treat the application as an application for execution of the decree. As regards authorities we have a decision of this Court in *Venkayya* v. *Raghavulu* [2] which laid down that to an application of a similar nature, the article of limitation applicable was that corresponding to Art. 182 of the present Limitation Act. But it is contended that the new Code has made some difference in this respect in as much as in S. 583 of the old code the words "to execute the decree" occurred, while those words are wanting in the present code. But as pointed out in a decision of this court in *Somasundaram Pillai* v. *Chokkalingam Pillai* [3] the Legislature could not have intended that an application for restitution should

1. (1909) I. L. R. 32 M. 136 at p. 137. 2. (1897) I. L. R. 20 M. 448.
3. (1917) I. L. R. 40 M. 780.

not be treated as an application in execution. All that the Legislature intended was to make clear that certain applications which under the old code were not included in S. 583 were included in S. 144, Civil Procedure Code. The view we take of S. 182 is also borne out by other decisions of this court reported in *Gopala Menon* v. *Anujan Rajah* [1] and also by an unreported decision in C. M. P. 134 of 1917. On the other hand, a decision of the Calcutta High Court reported in *Ashutosh Goswami* v. *Upendra Prasad Mitra* [2] has been cited to us for the contrary position. In the first place, the observation there seems to be by way of *obiter* and further no reasons are given in support of the view that Art. 182 did not apply. The learned Judges seem to have followed an earlier decision of that court, *Harish Chandra Saha* v. *Chandra Mohan Doss* [3] and that was under the old code. There also the question does not appear to have been properly discussed.

We hold that Art 182 applies to the application in question. We reverse the order of the Lower Courts and remand the petition to the District Munsif for disposal according to law. The respondent will pay the appellant's costs in this and in the Lower Appellate Court. Costs in the District Munsif's Court will abide the result.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE SRINIVASA AIYANGAR.

The Secretary of State for India in Council represented by the Collector of Tinnevelly. *Appellant* (Defendant).*

v.

Ambalavana Pandara Sannadhi Avergal, Head of Sri Panchakshara Desikar, Thiruvaduthurai Adhinam, *Respondent. (Plaintiff).*

Madras Irrigation Cess Act (VII of 1865) Ss. 1 and 2—River or stream belonging to Government—Irrigation—Extent of inamdar's right of user—Cultivation of excess area—Water-cess, levy of, when justifiable—Madras Land Encroachment Act (III of 1905) S. 2, Scope of—Nature and extent of riparian rights of private persons—Inam title-deed — Besides 'poramboke,' construction of—River-beds if included in grant.

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* A. No. 181 of 1915. 12th April, 1917.

1. (1911) 22 M. L. J. 146. 2. (1916) 21 C. W. N. 564.

3. (1900) I. L. R. 28 C. 113.

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The Government claimed under Madras Act VII of 1865. to levy water-cess upon certain inam lands in so far as the user of Government water for irrigation exceeded the user at the time of the Inam Settlement.. The main source of irrigation for the inam lands was a non-tidal non-navigable river, a considerable portion of whose course including the point where the channel which actually irrigated the lands in question took off, lay within the Inam limits. It was in evidence that the river also irrigated certain *ryotwari* lands below the point where the Inamdar's channel branched off and that a small hill stream flowing through ryotwari land emptied itself in the river. It was found that since the date of the Inam settlement 33 and odd acres of land had been added to the area of wet cultivation by the Inamdar. It was also found that the Inamdar was not actually drawing more water than what he and his predecessors-in-title had been taking from time immemorial; that the present system of irrigation had been in existence from before the Inam settlement; that the Inamdar was using the existing system of irrigation in the same way as his predecessor was using at the time of the Inam settlement; and that the Government had not spent anything so far as the irrigation system of the Inam lands was concerned.

Held that in the circumstances of the case, the claim of the Government to levy water cess on the excess area brought under cultivation since the Inam settlement was untenable.

Authorities on the point considered by Abdur Rahim, J.

Per *Abdur Rahim, J.*—By the words "standing and flowing water" in S. 2 of Madras Act III of 1905, is meant the water and the land on which it stands, or over which it flows, the whole taken together collectively and not the mere liquid apart and separate from the land The scope of the section is only to declare that certain classes of properties which do not belong to any individual private proprietor belong to the Government and not to cast the onus of proof on any person whose right to the subjects of property mentioned in S. 2 is contested by the Government. Each proprietor of the adjacent land has a right to the usufruct of the stream which flows through it and in that sense the stream is the common property of all the riparian proprietors. If the Government happens to be a riparian proprietor, it has got a right to the usufruct of the river in the same way as other riparian proprietors. Madras Act III of 1905 does not lay down that even in those streams and rivers in which the riparian rights of Zemindars or other owners of adjacent lands exist, a separate and independent proprietary right in the water subsists in the Government entitling it to demand from the owners of the lands on the banks any price it chooses for the use of the water.

Nature and extent of the rights of riparian owners in India, considered.

The question whether the use of the phrase "besides poramboke" in an Inam title-deed includes also the river-bed in the grant, is one mainly of interpretation, depending on the character and size of the river, the extent of the grant and the surrounding circumstances.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in Original Suit No. 38 of 1913.

The Hon. The Advocate General (*S. Srinivasa Aiyangar*) for Appellant.

T. Rangachariar and *S. Muthiah Mudaliar* for Respondent.

The Court delivered the following

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Abdur Rahim, J.

Judgments :—*Abdur Rahim, J.* :—This appeal is preferred by the Secretary of State for India in Council against the judgment of the Subordinate Judge of Tinnevelly in a case in which the right of the Government to levy water cess on 33 and odd acres of land in the inam village of Vadagarai belonging to the plaintiff-respondent is in dispute. The Government claims the right to levy cess on the allegation (paragraph 2 of the written statement) that the waters of a Government channel called Karimandy Ammankal mingled with the water in the Shamalanadhi river more generally known as Pachayar which supplies the channel and the tanks by means of which the plaintiff's village is irrigated, and that they are entitled to charge water rate on any land cultivated in excess of the quantity which was under cultivation at the time of the enfranchisement and confirmation of the inam in 1864—65. It is then claimed (paragraph 4 of the written statement) that the river Pachayar itself belongs to the Government. On the other side, it is alleged (see plaint, paragraph 9) that the whole course of the river from beginning to end lies within the plaintiff's inam limits. That statement is found to be not correct and no argument on the basis of it has been pressed before us. This river has its source in the hills which divide Travancore from the British territory in this locality and it flows up to and a little way below the anicut at the point where the channel which irrigates the plaintiff's lands takes off, along the plaintiff's inam village. On the southern side is the village called Arasapattu, the greater portion of which amounting to 390 acres is inam land belonging to the plaintiff and a very small portion amounting to 55 acres is ryotwari. Below the anicut and on the southern side, there is a ryotwari village called Pattai which is also irrigated by this river.

Admittedly, the quantity of plaintiff's land in the inam village of Vadagarai which was cultivated with water of the Pachayar river at the time of the Inam Settlement was about 115 acres and since then 33 more acres and odd have been converted into wet and it is with reference to the right to irrigate these 33 acres with water of the Pachayar that the question has arisen. The claim of the Government is founded mainly on the ownership of the Pachayar river and also on the allegation that the water of a Government hill stream or "odai"

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called Karimandy Ammankal gets mingled with the water of the Pachayar river above the anicut.

It will appear from the map that in its upper reaches the Pachayar bounds the inam village of Vadagarai on the north and the village of Arasapattu on the south. On the east of Arasapattu is the Government village of Pattai through which the river continues its course and we may take it, as contended by the learned Advocate-General appearing for the Secretary of State, that the Pachayar flows thereafter through a number of ryotwari villages. Though the Pachayar is not an altogether small stream, it is a non-tidal and non-navigable river and like most of such rivers, there is very little water in its bed in the dry season.

One important question of fact which was argued before us was whether the banks of the Pachayar above the anicut belong on the southern side, as they admittedly do on the northern side, to the plaintiff. It is not easy to locate the ryotwari land in the Arasapattu village as no definite evidence was adduced on the point but considering its small extent, we are not prepared to assume for the purpose of this case that the 55 acres of ryotwari land all stretch along the bank of Pachayar and are thus riparian property and that the rest of the lands amounting to 390 acres are all non-riparian situated at the back. The only evidence with respect to the possession of the southern bank is in favour of the plaintiff's case. For such evidence as there is on the point shows that acts of possession, such as, by the leasing of *Korai* grass on the islands and on the banks, have been for a long time exercised by the plaintiff. This evidence has been accepted by the Subordinate Judge and in fact there is nothing to rebut it. We must therefore hold that both the banks of the river above the anicut are owned by the plaintiff.

It is not disputed that this is a pre-settlement inam having been granted by some ruler of the country before the advent of the British Government. The anicut has been in existence for a long time and was constructed by the predecessors of the inamdars and so also the channels and the tanks by which the Vadagarai lands are irrigated. It is not suggested that the Government has constructed any works of irrigation in connection with this stream, at any rate, above the anicut. Nor is there evidence that they have in any way exercised acts of ownership with respect to this portion of the river.

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Under Section (1) of the Madras Irrigation Cess Act of 1865, whenever water is supplied or used for purposes of irrigation from any river, stream or channel belonging to or constructed by Government, the Government is entitled to levy a separate cess for such water provided the Zamindar or Inamdar whose land is so irrigated is not entitled, by virtue of engagements with the Government, to irrigation free of separate charge.

In order to justify the imposition of cess under this Act, it must be made out that the irrigation is caused by water supplied or obtained from a stream or river belonging to the Government. The question as to what classes of rivers, streams or channels belong to the Government has recently been the subject of much discussion in this Court, giving rise to a considerable conflict of opinion, so that it is difficult to say that there is any consistent statement of the law of binding authority which one can follow. One point of view is represented by the judgment of Miller and Munro, J.J., in the well-known Urlam case, *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* [1], and followed by Oldfield and Bakewell, J.J. in *The Secretary of State for India* v. *Janakiramayya* [2], and also approved by White, C. J. and Ayling, J. in *The Secretary of State for India, Ambalavana Pandara Sannadhi* [3]. On the other hand, Sankaran Nair, J. in more than one case has expressed the opposite view in elaborate judgments and his view has found acceptance with Sadasiva, Aiyar, J., in his dissentient judgment in *Secretary of State* v. *Janakiramayya* [2], while the learned Chief Justice and Seshagiri Aiyar, J., (in *The Secretary of State* v. *Maharaja of Bobbili* [4]) would seem to steer a middle course between the two positions. Further, the *Urlam case* * as well as the judgments in *The Secretary of State for India* v. *Maharaja of Bobbili*, [4] *Secretary of State* v. *Janakiramayya* [2] and Appeals 182-184 of 14 are under appeal to His Majesty in Council.

In this state of the authorities, I think it is desirable that I should state my own view of the law and the reasons for the conclusion at which I have arrived.

The entire basis of the decision of the Urlam case is the provisions of the Madras Land Encroachment Act, III of 1905,

1. (1910) I. L. R 34 M. 296.
2. (1915) 29 M. L. J. 389.
3. (1910) I. L. R. 34 M 366.
4. (1915) 30 M. L. J. 163.

* For judgment of the Judicial Committee, see 33 M. L J. 144.

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S. 2 of which declares "all public roads......................ditches.................the bed of the sea, harbours and quays below high-water mark, and all rivers, streams, nullahs, bays and tanks and all canals and water courses and all standing and flowing water and all lands wherever situated save in so far as the same are the property of any Zamindar................Inamdar................" to be the property of the Government "except as may be otherwise provided by any law for the time being in force, subject always to all rights of way and other public rights and to the natural and easement rights of other land owners and to all customary rights legally subsisting.—"

The very title of the Act and its preamble show that, as stated there, the Act is intended to provide measures for checking unauthorized occupation of lands which are the property of Government by the provision of penal or prohibitory assessment or charge.

S. 2 declares what are the properties of the Government. The rest of the sections deal with the mode of levying assessment on Government land, the penalty for unauthorized occupation of such land by any person, his liability for eviction therefrom, the notice to be given to him, the power to decide the question of assessment, all referring to *land*. There is not a single section which provides for the levying of any assessment, charge or penalty or any other mode of redress with respect to unauthorized user or appropriation of water standing or flowing as apart from the land it occupies.

The judgment in the Urlam case is founded in the first place on the supposition that the words "standing and flowing water" mean the liquid as separate from the reservoir, or stream containing it or through which it flows.

With the greatest respect, I think, it is perfectly clear that what is meant is the water and the land on which it stands, or over which it flows, the whole taken together collectively and not the mere liquid apart and separate from the land.

It is possible that the idea sought to be conveyed by the Legislature might have been more tersely expressed without sacrificing clearness; some of the words used are evidently superfluous. It is, however, clear to me that what the phrase "all standing and flowing water" was intended to include was all *land* covered with water or forming a water course.

Any other interpretation would lead to imputing to the Legislature an intention which it is difficult to conceive it could have ever entertained.

The interpretation which has been sought to place upon this section on behalf of the Government would logically result in declaring that the water even in wells, tanks and reservoirs or in springs and streams wholly situate in the land of a Zamindar, inamdar or any other proprietor, belongs *prima facie* to Government unless it can be shown that it belongs to the land owner. When this was pointed out to the learned Advocate-General during the course of the argument he said he was not prepared to go so far, but it is difficult to see how if the reasoning of the Urlam case is right, the extreme conclusion could be resisted.

Then is it correct to say that the effect of S. 2 is to cast the onus of proof on any person whose right to the subjects of property mentioned in S. 2 is contested by the Government?

I venture to think that this is not so. The scope of this section in my opinion is only to declare that certain classes of properties which do not belong to any individual private proprietor belong to the Government; I do not see how from this any inference could be drawn that if the Government chooses to assert a right to land, stream or any other class of property mentioned in the section as against the person in possession or enjoyment thereof, that thereupon without more and without regard being paid to any other facts, such as possession and user of the property in question, the burden is thrown upon him of proving that the property belongs to him. If that construction were right, it would make no difference in this respect whether the Government was seeking to eject the person in occupation or to levy on him a penal assessment or a water cess. I venture to think that such a radical and comprehensive subversion of the ordinary law of proofs was never contemplated. If it had been, one would have expected to find a clear and direct statement of such an intention. On the other hand, I find nothing in the words of S. 2 to warrant the supposition that the Government was there laying down a new rule of evidence or procedure of such general and far reaching significance. It is hardly possible that an important alteration like this in the law of evidence, if contemplated, should not have been dealt with by a clear and express enactment but left as a matter of merest inference to be drawn from the provisions of an Act addressed to

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the limited purpose of providing special remedies for cases of encroachments on Government lands. Laying the burden of proof, in my opinion, wrongly on the person in possession or enjoyment of a stream or river to show that it belongs to him, the next step in the argument on behalf of the Government, is stated in this simple form. According to ordinary notions of jurisprudence, flowing water cannot be the property of any private individual and therefore by virtue of S. 2 it becomes the property of the Government. In the first place, this argument overlooks the fact that by S. 2 the Legislature is dealing with unappropriated *properties* and not with unappropriated *things* supposing that flowing water comes within the latter category. Reliance is placed upon the definition of a stream as given by Lord Watson in "*M'cNab* v. *Robertson*,"[1] "as a body of water having as such a continuous flow in one direction," as shewing that the bed and the banks do not enter into the conception of a stream. In that case, all that Lord Watson wanted to make clear was that only a continuous body of flowing water with a well defined course and not water "which does not flow onward with any continuity of parts but becomes dissipated in the earth's strata." can be called a stream. It is obvious to me that Lord Watson could never have meant to suggest that the bed and the banks do not form parts of a stream or a river, which indeed would be opposed to our ordinary conceptions. In the well-known text book of Angell on Water Courses, it is stated at page 2 that a "water course" which includes rivers and streams—"consists of beds, banks and water." (See also Coulson's Law of Water Courses page 77). Nor do I find anything in S. 7 of the Easements Act to support a contrary notion. On the other hand the illustrations appended to that section particularly are in accordance with the ordinary conception of a river as consisting of the beds, the banks and the water.

Nor is the proposition that flowing water cannot be the subject of private property quite accurate. For instance, it can hardly be disputed that the water of a stream flowing entirely within the limits of a man's Zamindari or Inam is as much and as absolutely his property in every sense of the term as the soil over which it flows. With reference to a stream or a river flowing through the lands of a number of owners, it has long been established that such flowing water is not *bonum*

1. (1897) A. C 129.

vacans but that it is *publici juris* in the sense only that all may reasonably use it who have a right of access to it, and that none can have any property in the water itself except in that particular portion which he may choose to abstract from the stream and take into his possession (see *Mason* v. *Hill*, [1], per *Lord Denman* and *Embrey* v. *Owen*, [2]). It comes to this. Each proprietor of the adjacent land has a right to the usufruct of the stream which flows through it and in that sense the stream is the common property of all the riparian proprietors. If the Government happens to be a riparian proprietor, it has a right to the usufruct of the river in the same way as other riparian proprietors. I do not understand the provisions of the Land Encroachment Act as laying down that even in those streams and rivers in which the riparian rights of Zamindars or other owners of adjacent lands exist, that a separate and independent proprietary right in the water subsists in the Government entitling it to demand from the owners of the lands on the banks any price it chooses for the use of the water. If that were the correct interpretation of S. 2, the value of riparian rights in this Presidency would be very little indeed, and I do not find sufficient justification for such a construction. On the other hand the clause "subject always to all rights of way and other public rights and to the natural and easement rights of *other* land owners" points in my opinion to a contrary inference shewing that the Government's claim to streams, rivers and all standing and flowing water is in the character of a land owner.

Let us now consider the nature and extent of the right of user of the Pachayar river as claimed by the Inamdar as a riparian owner. In the first place, by virtue of his proprietorship of the land bordering on the river for a considerable length, he claims the right to conduct a portion of the water by means of channels into his tanks for purposes of irrigation. We may take it that the water so abstracted would not be returned to the river but would for the most part be absorbed in the soil in the process of irrigation. What the length is of these channels or the distance of the tanks from the river is not in evidence. But it is beyond doubt that the present mode of irrigating the inam lands has been in use from time immemorial. It is not alleged that by diverting a portion of the water into the channel, such a diminu-

1. (1832) 3 B and Ad. 304. 2. (1851) 6 Ex. Rep. 355 at page 369.

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tion is caused in the volume of water flowing down to the lower tenements as to cause material injury to their owners, among whom the Government may be included with respect to the ryotwari tract. In fact, it is common ground that this river like many other similar rivers in this Presidency is and has always been used in this way in irrigating lands situated on both sides. In this country, the user of streams and rivers for irrigation through a system of connected tanks which are filled with water obtained by means of channels is a most valuable right and has been recognised from the most ancient days. In fact, it would have been an inconceivable disaster to the country if the water of rivers in this Presidency were allowed to run to waste in seasons of rain when there is abundance of supply and was not stored in large reservoirs and tanks so that it might be utilised according to the requirements of cultivation. Even in England where the rain-fall is much better spread over different parts of the year, the use of natural streams by the riparian owners for purposes of irrigation is fully recognised, no less than manufacturing purposes. The mode and extent of the exercise of a right of this character must necessarily vary with the necessities of each country and should be ascertained mainly with reference to the prevalent usage. Judged by that test, the right of a riparian owner in the country to use a natural stream for purposes of irrigation cannot be said to be confined to any narrow strip of land along the banks. No authority has been brought to our notice which purports to define the limits of this right by the extent or depth of the areas sought to be irrigated. To what depth of the lands on the bank of a stream the right of irrigation extends must depend on the capacity of the stream and the extent of the land of the other riparian proprietors standing in need of irrigation. This is in accordance with the principle laid down in *Norbury* v. *Kitchin* [1], *Miner* v. *Gilmour* [2] and *White* v. *White* [3]. In this Presidency, in most cases where the stream is small, the whole or a greater portion of the water is diverted by means of channels into tanks by the different proprietors putting up dams in the streams in turn for some days. If the supply is not sufficient for all the adjacent proprietors, the quantity and extent of land which each proprietor is entitled to irrigate may depend on well-established usage, on mutual arrangement or on the terms of a grant. There is no rule

1. (1863) 7 L. T. Reports, 685 (n. s.)=9 Jur. (n. s.) 132.
2. (1858) 12 Moo. P. C. 131, 156=14 E. R. 861. 3. (1906) A. C. 72.

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of law in this country so far as it can be ascertained that the right to irrigation by a riparian owner is confined to any particular quantity of land. The criterion is whether the extent or mode of enjoyment claimed is reasonable (see *Embrey* v. *Owen* [1], *Rameshwar Pershad Narain Singh* v. *Koonj Behari Pattuk* [2]). An user which is not objected to and is in fact adopted by and is for the benefit of all the riparian proprietors must, in my opinion, be held to be reasonable and it is not open to a third person such as the Government unless it happens to be a riparian proprietor, to raise any question so far as this is concerned.

Then it cannot be said that, where the lands in a Zamindary or an Inam village are cultivated by ryots and tenants, it necessarily follows that only the parcel on the bank in the occupation of a particular individual ryot will be treated as a riparian tenement and not the other holdings in the interior, so far as any question arises between the Zamindar or Inamdar whose tenants they are on the one hand and the other riparian proprietors on the other. In such cases, where it is the duty and interest of the Zamindar or Inamdar to supply the tenants with water for purposes of irrigation, he must be deemed to be the riparian owner representing the tenants as a body.

I may here refer to a very instructive judgment in an American case to which my attention has been drawn and which lends support on the general view of the law as I have expressed it.—60 Lawyer's Reports Annotated 889.

Sankaran Nair, J. in *Secretary of State* v. *Janakiramiah* [3] has fully discussed the question as to how far the Zamindars and Inamdars are entitled to irrigate their lands, free of charge, from a natural stream flowing through the Zamindari or Inam village with reference to the history of the permanent settlement and the enfranchisement of Inams and the customary law of the land. I agree with his general conclusion that except where it is expressly provided otherwise in the Sanads or title-deeds the Zemindars or Inamdars are entitled to bring into cultivation land which was lying uncultivated at the time of the settlement and to raise additional crops by the user of natural stream to the extent of the quantity lying within the ayacut of

1. (1851) 6 Ex. Reports 355. 2. (1878) L. R. 4 A. C. 121, 126.
3. (1913) I. L. R. 37 M. 322.

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those streams as explained at pp. 333 and 334 in *Secretary of State* v. *Janakiramayya* [1] without making themselves liable to a further payment whether by way of water cess or other assessment. I further agree with him and with Sadasiva Aiyar, J. in *The Secretary of State for India* v. *Janakiramayya* [2] that no inference can be drawn from the fact that in the sanads or title-deeds the quantity of lands under wet cultivation is mentioned, that the Zamindar or Inamdar is not entitled to irrigate and thus bring into cultivation the waste lands with water of natural streams passing through a village without making himself liable to additional payment. The above view of the law, is also, in my opinion, in agreement with the trend of decisions of this Court until the date of the Urlam case. (See *Ponnuswami Tevar* v. *The Collector of Madura* [3], *Maharana Fatteh Sangji* v. *Dessai Kallianraiji Hekoomut Raiji* [4], *Narasimha Sastrial* v. *Secretary of State* [5], and *The Secretary of State for India* v *Perumal Pillai* [6]).

The question whether the use of the phrase "besides poramboke" in the Inam title-deed shewing that the river bed is included in the grant, is one mainly of interpretation. It seems to me that no uniform rule can be laid down in this connection whether river beds were or were not meant to be included in the words 'besides poramboke.' This must depend on the character and size of the river, the extent of the grant and the surrounding circumstances. In cases of small rivers and the streams running through the lands of a few large proprietors, the presumption would be in favour of inclusion of river beds while the phrase may not ordinarily be applied to the beds of large rivers like the Cauvery. (See *The Secretary of State for India* v. *Raghunath Thathachariar*, [7]). In the present case, I should be inclined to hold that as the Inam village Vadagarai did not extend to both sides of the river, no specific intention could be imputed to the Government of granting any portion of the bed of the river.

The claim of the Government is also based on the ground that one of the sources from which the Pachayar river derives its water supply is a small hill stream or odai flowing through ryotwari land. It is argued that inasmuch as the water of this stream

1. (1913) I. L. R. 37 M. 322.
2. (1915) 29 M. L J. 389.
3. (1869) 5. M. H C. R. 6.
4. (1873) L.R. 1 I.A. 86.
5. (1891) 1 M. L. J. 167.
6. (1900) I. L R 24 M. 279.
7. (1912) 24 M. L. J. 31 and 86.

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which may be taken to belong to Government mingled with the water of the Pachayar river it must be deemed to be a case in which the plaintiff's land is irrigated by water of a stream belonging to Government within the meaning of S. 2 of the Irrigation Cess Act. I do not find any warrant for such a wide construction of the section which would mean that because a river happens to receive a supply of water however small in proportion to the entire volume from a stream running through the Government land therefore any riparian owner using the water of the river must be deemed for sooth to be using water from a stream belonging to the Government because it is not possible to separate the quantity of water introduced by such a stream. The untenable character of such an argument if stated without any limitation becomes obvious when it is seen that it might logically be extended even to cases where surface water from land belonging to Government is drained into a riparian stream. The irrigation which makes a man liable to cess under that section must, in my opinion, be with water derived either entirely or at least to a substantial extent from a river, stream or channel belonging to the Government. To hold otherwise would be putting a strained and unnatural construction on the words of the Legislature. I say this in spite of the respect which I owe to the decision of the learned Judges who decided the Urlam case and those who have substantially followed that judgment.

Having thus far indicated my own view of the law which is in accordance with what has been laid down by Sankaran Nair, J. in several cases to one of which in *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi* [1], I was a party, I shall now very briefly point out what extent I am free to give effect to it, so far as the question involved in this appeal is concerned. A Full Bench of this Court by a majority (Sadasiva Aiyar, J., dissentiente) held in *The Secretary of State for India* v. *Janakiramayya* [2], in an appeal under the Letters Patent arising from a difference of opinion between Sankaran Nair, J., and Munro, J., that where only one of the banks of the river belongs to a Zamindar or Inamdar, the water obtained from the river is liable to be assessed under the Act as in such a case the river must be said to belong to the Government. But in a later case reported in *The Secretary of State for India* v. *Maharajah of Bobbili* [3], a Divisional Bench

1. (1913) I. L. R. 37 M. 369. 2. (1915) 29 M. L. J. 389.
3 (1915) 30 M L. J. 168.

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consisting of the learned Chief Justice and Seshagiri Aiyar, J., were of opinion that the decision in the Urlam case which was of another Divisional Bench went too far. They were, however, bound to accept the law as laid down in the decision of Oldfield, J. and Bakewell, J., in the Letters Patent Appeal mentioned above but only on the point actually decided in that case, namely, that where only one bank of a river is shown to belong to a Zamindar, he is not entitled to the user of the water of that river for purposes of irrigation free of charge. They felt themselves free to decide otherwise in a case where both the banks at the point where the water was taken were shown to be within the Zamindari limits. I must admit that it is difficult to perceive any logical foundation for this distinction. The rights of a riparian owner which are fully recognised in this country (See section 7, Easements Act, section 2 of the Irrigation Cess Act itself and the case above cited) are based not on the ownership of the bed but on the ownership of the adjacent lands on the bank which give the owner the right of access to the stream. No doubt, the owner of the land on the bank is also presumably the owner of half the bed of the stream opposite his land and the owner of land on both the banks is the owner of the entire bed lying between those banks. But the owner of adjacent lands on both sides of a stream has no higher right of usufruct in connection with the tenement on one side than he would have if he did not possess the tenement on the opposite bank. The riparian right is based on the possession of a natural advantage arising from the vicinity of a stream and is like the right of lateral support which a man has for his land from his neighbour's land. (See *Lyon* v. *Fishmongers' Company* [1], *Miner* v. *Gilmour* [2], and *Chasemore* v. *Richards* [3].) There is no reason so far as I can see for denying the full enjoyment of that advantage to the owner of adjacent lands on one bank. That is however the ruling in *The Secretary of State for India* v. *Janakiramayya* [4], and I agree with the learned Chief Justice and Seshagiri Aiyar, J. that it should not be extended any further.

But I think I ought to mention that there is force in the argument of the learned Vakil for the respondent that since it is not shown that his client has been taking more water than before, the mere fact that he has been cultivating more land is not suffi-

1. (1876) 1 App. Cases 631.
2. (1858) 12 Moo. P.C. 131.
3. (1859) 7 H. L. 349, 382
4. (1915) 29 M. L. J 399.

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cient to justify the Government in levying water cess. It is not the case of the Government that either the channel or the tanks have been widened or deepened, but we are asked to presume that the larger cultivation was due not to a more economical use of the water but to the use of more water than the Inamdar has been accustomed to receive.

In the circumstances, the burden was, in my opinion, on the Government, to show, even supposing that the stream could be said to belong to the Government, that the Inamdar has been actually storing in his tanks more water than he was entitled to do under the engagement with the Government at the time of the Inam enfranchisement and settlement. This view is in accordance with the decision in *Secretary of State* v. *Perumal Pillai* [1], the principle of which was accepted in *Maria Susai Mudaliar* v. *The Secretary of State for India in Council* [2], though it is opposed to the decision in the Urlam case.

I hold therefore that the conclusion of the Subordinate Judge is right and the appeal must be dismissed with costs to be paid within three months from this date. C. M. P. No. 159 of 1916 is also dismissed.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.:—I agree that the appeal fails. I have come to this conclusion on the ground that the plaintiff is not drawing more water than what he and his predecessors in title have been taking from time immemorial, that the present system of irrigation has been in existence from before the inam settlement and that the plaintiff is now using the existing system of irrigation in the same way as his predecessor was using at the time of the Inam settlement. As the question of the Government ownership of waters, and the construction and effect of the Madras Land Encroachment Act is likely to be decided soon by the Lords of the Judicial Committee* it is unnecessary for me to express any opinion on these questions in this case.

A. V. V.

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* For the Judgment of the Judicial Committee, see. 33 M. L. J. 144.

1. (1900) I. L. R. 24 M. 279.
2. (1904) 14 M. L. J. 350.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING.

Koroth Mammad	...	*Appellant* in Criminal Appeal No. 26 of 1917 (1st Prisoner).*
and		
Palacheruvatparkum Mullappalli Mammad.	...	*Appellant in Criminal Appeal No. 27 of 1917. (2nd Prisoner)*

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Indian Penal Code, S. 370—Buying, selling or disposing of a person as a slave—"Slave" in Sec. 370, meaning of—Instrument disposing of a certain person, his heirs and their services—Surrounding circumstances to be taken into account in judging of the nature of the transaction and intention of the parties.

Where a person executes to another a document in these terms: "I execute to you and give you to-day Janmam deed, giving you V with his heirs. The sum I received from you in cash to-day is Rs. 10. For this sum of Rs 10 you should get work done for you by the aforesaid V and his offspring that may come into being as your Janmam (property) and act as you please."

The question whether this amounts to a sale of V as a slave has to be determined not merely with reference to the language of the document but with reference to the evidence and conduct of the parties, the consciousness and conduct of V himself a grown-up person being taken into consideration.

Held, per Napier and Ayling, JJ., (*Abdur Rahim, J.*, dissenting) that the terms of the document along with the conduct of the parties established that V was sold as a slave and that an offence under S. 370 was committed by the parties to the document.

Per Abdur Rahim, J.—The minimum requirement of the status of slavery under S. 370, Indian Penal Code, would seem to be that absolute power should be asserted over the liberty of the slave and on his personal services. The statement in *Empress of India* v. *Ram Kuar* [1], cited with approval in *Amina* v. *Queen Empress* [2] that S. 370 and the cognate sections of the Indian Penal Code "were enacted for the suppression of slavery not only in its strict and proper sense *viz.*, that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another but in any modified form where an absolute power is asserted over the liberty of another" followed.

His Lordship after an examination of the evidence and the conduct of the parties came to the conclusion that only the relation of master and servant was created between V and the parties to the instrument.

Per Napier, J.—'Slavery' in S. 370 does not connote an absolute and unlimited power over the life of another. Observations to the contrary in *Ameena* v. *Queen Empress* [2] diss. from.

On an examination of the history and conditions of Cherumas to which class V belonged, his Lordship came to the conclusion that the conditions of service imposed by the document brought the case within S. 370 of the Indian Penal Code.

Per Ayling, J:—'Slavery' in S. 370 includes something very far short of slavery in its most extreme forms wherein the master has absolute and unlimited powers over the life, fortune and liberty of the slave.

Amina v. *Queen Empress*[1] and *Empress of India* v. *Ram Kuar* [2] followed.

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* Crl. A. Nos. 26 and 27 of 1917. 27th August, 1917.

1. (1880) I. L. R. 2 A. 723 (F. B). 2. (1884) I. L. R. 7 M. 277. at 279.

On an examination of the circumstances of the case and the terms of the document, His Lordship came to the conclusion that an offence under S. 370. was committed.

Appeals against the Judgment of the Court of Session of the North Malabar Division in Case No. 35 of the Calendar for 1916.

J. C. Adam, Public Prosecutor for the Crown.

Accused not represented.

The Court (Abdur Rahim and Napier, JJ.) delivered the following

Abdur Rahim, J,

Judgments:—*Abdur Rahim, J*:—These are appeals from the convictions of two persons under S. 370, Indian Penal Code, the 2nd accused having been found to have sold a Pulayan named Vellan and the 1st accused to have bought the said Vellan, as a slave. The case comes from North Malabar; the two accused are Mappillas and Vellan who is of the age of 25 years, is a Cheruman, a caste which until the abolition of slavery by different Acts, the last and most important of which was Act 5 of 1843, occupied the position of serfs or 'rice slaves,' as Pulayans are called in Gundert's Malayalam Dictionary. The transaction is evidenced by a document executed by the 2nd accused in favour of the 1st accused in these terms, "I execute to you and give you to-day the 27th Medam 1088 (this) Jenmam deed giving you Velandi's son Pulayan Kurungot parkum Vellan, with his heirs. The sum that I received from you in cash to-day, is Rupees 10-0-0. For this sum of rupees ten, you should get work done for you by the aforesaid Vellan and his offspring that may come into being as your *Jenmam* and act as you please." The use of the word *Jenmam*, which means property, might, if it stood alone, imply that these two persons were dealing with Pulayan Vellan as a chattel. The nature and object of the transaction is however explained more explicitly as being to the effect that the 1st accused, the so-called purchaser, was to get work done by the said Vellan and his offspring.

The question is, was Pulayan Vellan sold and bought as a slave? This has to be determined not merely with reference to the language of the document, but with reference to the evidence and conduct of the parties. In this connection, the consciousness and conduct of prosecution 1st witness himself who was a grown up person, at the date of the transaction and had been born and brought up in British India must also be taken into consideration,

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The word " slave " is not defined in the Indian Penal Code or in any other Act, so far as I know. In Webster's Dictionary, a slave is defined as 'one who has no freedom of action, but whose person and services are wholly under the control of another;' in the Century Dictionary, as 'a person who is the chattel or property of another and is wholly subject to his will'. In Wharton's Law Lexicon, 'slavery' is defined as 'the civil relation in which one man has absolute power over the liberty of another'. In Roman Law, slavery properly speaking was, as stated by Mr. Hunter in his book on Roman Law, an institution of the *Jus Gentium* by which, contrary to nature, a man became the property of a master. Even under that system, the full rights incident to property, such as the right of destroying, ceased to be recognised during the Empire and the rescripts of the different Emperors afforded considerable protection to the life of a slave. But as stated by Mr. Hunter it must be taken to be inherent in the condition of slavery as conceived in the Roman Law that the master has a right to all the services the slave is capable of rendering and to everything that the slave, if free, would have acquired for himself, and conversely the slave himself has no right to property. In Muhammadan Law, the salave has a complete right to the protection of his person and life, just like a free man. The condition of slavery according to that law amounts to this that he cannot own any property, his master being entitled to the full usufruct of his labour. In my opinion therefore the statement in *Empress of India* v. *Ram Kuar*; [1] which is cited with approval in *Amina* v. *Queen-Empress* [2], that S. 370, and the cognate sections of the Indian Penal Code " were enacted for the suppression of slavery not only in its strict and proper sense, *viz.*, that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another, but in any modified form where an absolute power is asserted over the liberty of another " is correct. The minimum requirement of the status of slavery would thus seem to be, that absolute power should be asserted over the liberty of the slave and on his personal services. As observed by Stuart, C. J., in *Empress of India* v. *Ram Kuar* [1], " the actual accomplishment of placing a human being in the condition of a slave could not have been contemplated, inasmuch as the possibility of accomplishing anything unknown to

1. (1880) I. L. R., 2 All. 723. 2. (1884) I. L. R. 7 M 277 (at p. 279).

the law, cannot be supposed to have been meant or intended; S. 370 therefore can only be understood as directed against attempts to place persons in the position of slaves, or to treat them in a way which is inconsistent with the idea of the person so treated being free as to his property, services or conduct in *any respect.*"

This, in my opinion, being the proper test, the question is, whether the accused attempted to treat Vellan in a way which is inconsistent with the idea of his being "free as to his property, services or conduct in any respect." In this connection I shall take the following facts to be proved and that is practically what is found by the Sessions Judge. Vellan did not live on the land of either of the accused, but lived on the land of another person, with his mother and step-father, his own father having died when he was a child. None of his parents were ever treated as slaves and it appears from the evidence that his father worked not only for the 2nd accused but also for other persons and he never lived on the land of the 2nd accused. Vellan began to work for the 2nd accused about 3 years before the date of Exhibit B and it is not suggested that the 2nd accused bought or received him either from his mother or step-father or anybody else as a slave. There is also evidence that before the date of Exhibit B, Vellan sometimes worked for other employers and received daily wages which he was free to spend as he chose, though it may be taken as proved that during the three years before Exhibit B, Vellan worked practically exclusively for the 2nd accused. The man married, borrowed money for this and other purposes on his own credit and paid off the debt with his earnings. He used to buy supplies from shops on credit and afterwards settle the account himself. The wages he used to get from the 2nd accused were a measure of paddy a day, which he admits to be the usual payment of Cheruma labourers. The payment of prevalent wages to Vellan would in itself indicate that the relation between him and either of the accused was not that of a slave and a master. There is the further fact that just before the execution of Exhibit B, the 1st accused had agreed to lend Vellan Rupees 8. Even after the execution of Exhibit B, Vellan continued to live with his mother and step-father, was paid daily wages by his new master the 1st accused. These facts make it clear that neither any of the accused nor Vellan himself ever thought or intended that Vellan was or should be incapable of acquiring property or of

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entering into contracts, and that both the 1st accused and the 2nd accused in fact treated Vellan as if he was fully possessed of such capacity. The evidence of Vellan himself shows that he received wages from the 2nd accused only on the days on which he worked, and the 2nd accused never made himself responsible for his maintenance for the days that he did not work or could not work owing to sickness. It may also be presumed that this state of things continued when Vellan worked under the 1st accused. All these facts indicate that the 2nd accused and after the date of Ex. B, the 1st accused never understood that they were in any way responsible for the lodging and maintenance of Vellan which would have been the case if Vellan stood in the position of a slave.

As regards Vellan's liberty of movement, the effect of the evidence, in my opinion, is that so long as he worked for the 2nd accused or for the 1st accused after the date of Ex. B, it was understood that he was not at liberty to offer his services to another without the permission and consent of his employer for the time being. Once he obtained the permission of the 2nd accused to go to Wynaad and work there, but it is not suggested that the 2nd accused claimed any share in his earnings at Wynaad. He, sometimes, though not often, went to the other places also for work, after obtaining the permission of the 2nd accused. Similarly after he went over to the 1st accused, he apparently used sometimes to work elsewhere with the latter's consent. The legal relation which the parties thought, subsisted between them, was that of employer and labourer and I do not think it makes any difference in this respect, that during the time Vellan worked for the 2nd accused or the 1st accused, both Vellan and his employer thought that Vellan was not at liberty to work elsewhere without the consent of the 2nd or the 1st accused.

The law does not allow contracts for personal service to be specifically enforced, but it recognises such contracts as valid in law. If a person enters into a contract for personal service for a reasonable term and afterwards breaks it without lawful excuse, he is liable in damages to the promisee. And a contract for service by which a person competent to contract precludes himself from serving another person during a specified term, though it cannot be specifically enforced, is a legal and valid contract the breach of which will make the party guilty of the breach liable in damages

to the other party. There may, however, be contracts for personal service, such as one for an unlimited period, which would be void on grounds of public policy and no rights which the Court could recognise, would arise under such a contract. For instance if a grown up person competent to contract enters into a contract with another agreeing to render him personal service throughout his life and not to serve any other person, such a contract would be unenforceable specifically and may be void on grounds of public policy, but it would, in my opinion, be going much too far to say that the relation sought to be created thereby, would be that of a 'slave' and a master. The inference to be drawn from the facts relating to Vellan's employment under the 2nd accused before the date of Exhibit B, imply at the highest nothing more than a contract of this nature. Every contract of personal service must necessarily be a restraint upon the liberty of the person who has agreed to render such service, but that is not the sort of restraint which is implied in the status of a slave. Both the cases *Empress of India* v. *Ram Kuar* [1], and *Amina* v. *Queen Empress* [2], make it clear that the control sought to be established over the liberty of the person who is purported to be dealt with as a slave must be of an absolute character. This is a distinction which it is important to bear in mind. There is a very large class of domestic servants in this country—and I believe there are also such classes elsewhere,—who ordinarily adhere to the same master throughout their lives and their offsprings also continue as domestic servants in the same family. It may or may not be that such service had its historical origin in the status of slavery. Whatever that may be, it would be an outrage on one's common-sense to suppose that domestic servants of this class occupy the position of slaves.

One of the prosecution witnesses, prosecution 10th witness says "There are many Cherumas in my Amsam. It is usual for particular Cherumas to go on working for particular families year after year. It is usual for them to obtain the permission of their masters before leaving them to work for other masters. So far as I have noticed, Cherumas leave their masters only after getting their permission to do so." Upon that, the learned Sessions Judge rightly observes, "that indicates little, if anything, more than a hereditary relation of master and servant such as in many societies is a wholesome relic of a traditional and perhaps very different relation

1. (1880) I. L. R., 2 All. 723. 2. (1884) I. L. R., 7 M 277.

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in the past." The facts of the case prove that the relations subsisting between Vellan and the 2nd accused and that sought to be created between Vellan and the 1st accused, was nothing more than what is described in prosecution 10th witness's evidence.

There cannot be the slightest doubt upon the evidence that Vellan who signed or put his mark on Ex. B as an attesting witness knew of the nature of the transaction and gave his consent to it. He consented to his services being transferred by 2nd accused to 1st accused. That is how he understood Ex. B and so also the 2nd and 1st accused; none of the parties, I am persuaded thought that any change was intended in the status of Vellan and I have already described what in my opinion is proved to have been the relation between the 2nd accused and Vellan before the execution of Ex. B. By Ex. B, therefore, all that the 2nd accused purported to transfer to the 1st accused was the right which he had or supposed he had to the services of Vellan. The use of the word 'jenmam' and the mention of Vellan's offspring has been transferred, if they stood alone and were not to be interpreted in the light of the facts, would undoubtedly suggest that it was attempted to deal with Vellan as a slave. But if we read the document in the light of the evidence showing the intention and conduct of the parties, then it seems to me that the proper conclusion which is to be drawn is that nothing more was intended than a transfer of the right to the personal services of Vellan and his children which the 2nd accused thought or pretended that he had. If a lawyer had drafted the document of transfer, he would be expected to know and make clear the distinction between a transfer of a right to the personal services of a man and a transfer of property. But I think it would be altogether unsafe to impute such technical knowledge to the 2nd accused who wrote Exhibit B or to the 1st accused and convict them on the basis of certain expressions used in that document, which the 2nd accused in all likelihood simply borrowed from ordinary documents relating to sales of property. In the case of *Amina* v. *Queen Empress*,[1] the word 'Vellati' which means 'slave, was used. No such word is to be found in Exhibit B and we have to ascertain what was actually intended and done in the light of the surrounding circumstances. That the accused themselves never thought that the transaction recorded in Exhibit B amounted to an offence of selling and

1. (1884) I. L. R. 7 Mad. 277.

buying a slave or to any offence at all, is evident from the fact that a suit was actually instituted on the basis of that document and a pleader was engaged to and did in fact conduct the plaintiff's case. I need hardly point out that if a labourer or domestic servant of this class is detained against his will, the person so detaining is liable to be prosecuted for wrongful restraint or wrongful confinement, or if he is ill-treated by the master, the latter would be liable for other offences under the Indian Penal Code. But any such high-handed proceedings alone, would not be sufficient to show that the relation of master and slave was sought to be asserted.

I would therefore set aside the convictions and sentences against the prisoners and direct that they may be discharged from bail.

But as my learned brother holds a different opinion, the papers will be placed before the Chief Justice for reference to a third Judge or such other order as he may think fit to pass.

Napier, J.:—The accused in this case have both been convicted under S. 370 of the Indian Penal Code, the 1st accused with buying and the 2nd accused with selling a person as a slave. The language of S. 370 is as follows:—"Whoever imports, exports, removes, buys, sells or disposes of any person as a slave shall be punished etc." The transaction was effected by a document, Exhibit B, which is as follows: "Edavad Adharam executed by the 2nd accused to the 1st accused, 'I execute to you and give you this day this jenmam deed giving you Velandi's son Pulayan Vellan with his heirs. The sum that I received from you in cash to-day is Rs. 10. For this sum of Rs. 10 you should get work done for you by the said Vellan, and his offspring that may come into being as your jenmam, and act as you please."

The important words in this document are, first, the word "jenmam" used twice over, secondly the word 'heirs' and thirdly the word 'offspring.'

The document purports to be a deed of hereditary ownership and the granting of Pulayan Vellan and his heirs as jenmam can only mean the grant of that person and his heirs to the grantee and his heirs in absolute ownership. It is to be noted that the grant is not of the services of Pulayan Vellàn, but the grant of the man himself and his heirs, the provision for getting work done for him being a second clause.

Koroth Mammad *In re* — Napier, J.

The Sessions Judge in convicting the accused states his opinion that such an assertion of the right to control the liberty of a Cheruman as the transaction implies is not so far divorced from the facts of life at present that it can be treated as a matter of no moment. He therefore thought that it was not an offence which could be treated lightly and sentenced the accused each to one year's rigorous imprisonment. It is to be noted that the District Munsif of Quilandy before whom this document was filed in a suit and who is himself a Malayalee, speaks of the document as a very curious one. He of course dismissed the suit founded on it, holding the consideration to be illegal, immoral and opposed to public policy.

The first question that has to be considered is, what is the meaning of the phrase "selling as a slave." There is no definition of the word 'slave' in the Code, and our attention has been drawn to various elements of slavery extending over a period from early Roman history to modern times. To my mind we have nothing to do with ancient history but have only to consider what was in the mind of the framers of the Penal Code. The history of this section is dealt with in the judgment of Spankee, J. in *Empress of India* v. *Ram Kuar* [1], and he there refers to a report of the Commissioners in 1837 (the year of the first draft) which points out that "there is at present no law defining the extent of the power of a master over his slaves." It must be remembered, too, that at that time slavery was an established institution in the greater part of the United States and had only very recently ceased to exist in some British Colonies. The idea may seem remote to people of the present day, but thousands of people are alive who were born in slavery and thousands who witnessed the emancipation of slaves in the United States. There being no absolute standard of slavery and no uniformity of practice, it is, therefore, not surprising that when the first Act dealing with the condition of slavery was passed in India in 1843, it was not thought advisable to include any definition of the word. Act V of 1843 provides:—

> S. (1):—that no person, nor the right to the compulsory labour or services of any person on the ground that such person in a state of slavery, shall be sold in execution of a decree of Court,

1. (1880) I. L. R. 2 All 723.

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S. (2) :—that no right arising out of an alleged property in the person and services of another as a slave shall be enforced by a Court,

S (3) :—that no person shall be deprived of any property on the ground that such person was a slave;

S. (4) :— that any act which would be penal offence if done to a free man shall be equally an offence if done to a person on the pretext of his being a slave."

It is to be noted that this Act does not go nearly as far as the Penal Code, for it imposes no penal consequences whatsoever in connection with slavery. It does not forbid the keeping of slaves or dealing in slaves; but only gives to such persons their right to hold property and to be protected by law. Such a transaction as is the subject of this conviction would not have been any offence against any law, though, as will be shown later, it was forbidden by proclamation prior to the passing of the Penal Code. It is therefore clear to my mind that the word 'slave' in the Penal Code does not connote anything more than a right to property in the person, a right to retain his services, and a right to dispose of his person and services. These conditions are dealt with by the Penal Code with the effect that slavery as then existing in India was made illegal. That being so, it cannot, I think, be disputed that this document, if taken by itself, offends against the provision of the section and the parties to it would be guilty of the offence. A similar case came before the High Court in 1884. *Vide Amina* v. *Queen Empress* [1]. A document vouching the payment of Rs. 25 to one Supi in consideration of his transferring all his rights over a girl described as his *Vellati* whom he had purchased from Pakir Haji was given to one Ameena. She refused to let the girl go until she got back the money she had paid for her. Supi and Pakir Haji were convicted of selling the girl as a slave and Ameena of buying. The convictions were upheld by the High Court. The assessors in that case gave their opinion that the use of the word *Vellati*, as understood by the Mappillas of North Malabar, clearly showed that Bheema was sold as a slave. The learned Judges state their opinion as to the purview of Ss. 370 and 371 and adopt the language used by the High Court of Allahabad in the case already referred to namely that the sections were enacted for the

1. (1884) I. L. R. 7 Mad. 277.

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suppression of slavery, not only in its strict and proper sense, *viz.*, that condition whereby an absolute and unlimited power was given to the master, but also where and absolute power is asserted over the liberty of another, whereby one who claims to have a property in the person as a slave transfers that property to another. The same idea is expressed in other words in *Empress of India* v. *Ram Kuar* [1]. "The section is directed against attempts etc., to place persons in the position of slaves or to treat them in a way that is inconsistent with the idea of the person so treated being free as to his property, services, or conduct in any respect." I am not prepared for the reasons given earlier in this judgment to agree that the strict and proper sense of the word 'slavery' connotes an absolute and unlimited power over the life of another as was thought by the Judges in *Amina* v. *Queen Empress* [2]. But I entirely accept the view taken by the Court as to the object of section 370. It is urged, however, that we have to look not so much to the language as to the intention of the parties to be gathered from the conditions which prevailed. I give a certain amount of weight to this contention though I am not prepared to say that even where servile conditions were unknown, a document executed with the intention that the subject of the document should be kept in a condition of slavery would not constitute an offence. I proceed, therefore, to examine the history and conditions of people of this class. The person sold is shown in the document to be a Pulayan. Exhibit A is the document executed by this Pulayan to the 1st accused. It shows that the Pulayan borrowed Rs. 8 from him and it provides that for the interest on this sum of Rs. 8 he shall make a hut in such place as is required by his master and live in it and do cooly work "as you may require me to do"; receiving from his master a kalapadu dangali of paddy every day for his maintenance, *while the balance of the profits of his work are to belong to his master.* The value of a year's paddy which constitutes the entire amount that he is entitled to receive is stated in the document to be Rs. 20-1-8 which works out at Re. 1-10-0 a month There is, obviously, no room under this document for his working off the amount of the debt with the necessary result that unless he can get a sum of Rs. 8 elsewhere he must remain with his master for the rest of his life. The provision for payment in paddy only is

1. (1880) I. L. R. 2. All. 723 *vide* page 727. 2. (1884) I. L. R. 7 Mad. 277.

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to be especially noted. Turning to Gundert's Malayalam Dictionary which was published in 1872, I find that 'Pulayan' is translated as first, an 'outcast,' secondly 'a caste of rice slaves.' This latter meaning seems to me to be singularly applicable to the conditions of service which this man undertook. The history of these people is set out in Logan's Manual of Malabar published in 1887, beginning at page 146 of Volume I. The Pulayan is stated to be one of two sections of the Cherumas, the other being Iraya Cheruma. Speaking of the cherumas Mr. Logan says as follows:—"The next caste to be noticed is formed of the Cherumar or agrestic slaves" and he sets out the result of a census taken in 1857 of the slave population, showing their distribution over the district, the total number being 187,812, the largest number being in Ernad, Valluvanad and Ponnani; Kurumbranad Taluq the place where this man lived having at that time 16,590 slaves. Mr. Logan then gives a very interesting account of the action of the East India Company in respect of slavery. As early as 1792, the year in which the British rule commenced, a proclamation was issued by the company against dealing in slaves, subject to this "that the superior castes were still to be permitted to buy the children of famine-stricken parents on condition that the parents may repurchase their children when they were in a position to do so." In 1819 the practice of selling slaves for arrears of revenue was forbidden. This prohibition is repeated in the Act of 1843 above referred to. The matter was allowed to drop until 1836 in which year Government was pleased to accede to the recommendation in favour of emancipating slaves on Government lands. This was however not to be proclaimed but to be carried out in such a manner as not to create alarm on the part of other proprietors or 'premature hopes of emancipation on that of other slaves. In 1839 a Collector stated his opinion that there are few or no slaves in North Malabar. But the incorrectness of this statement was demonstrated a few years later by a letter from Mr. Thomas, Judge of Calicut in 1841 to the Sudder Adawlat pointing out facts which had come judicially to his notice. He referred to a sale in Court auction of an infant slave, and to a suit in which the right to 27 slaves was the sole matter of litigation and further stated that women in some taluqs fetched higher prices in order to breed slaves. In the next year he returned to the same subject and stated that the number of slaves had increased in 7 years from 144,000 to 159,000. In

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consequence of these letters apparently, the Directors in dealing with the proposal to abolish slavery entirely, drew the attention of the Government of India to the fact that the evils connected with slavery in Malabar were aggravated as compared with other portions of India. After the passing of the Act in 1843, which as noted above, did not abolish the status of slavery, the Collector of Malabar endeavoured to pave the way to eventual abolition by a proclamation to Cherumas and their masters, his action being approved of by the Directors in 1845. Mr. Logan then states that in 1852 and 1855 the traffic in slaves still continued, that it was considered by Government but no further measures for the emancipation of the Cherumas were deemed to be necessary. He then sums up the position in the year 1887 in which he wrote: "There is reason to think that they are still, even now, with their full consent, bought and sold and hired out, although of course the transaction must be kept secret for fear of the penalties in the Penal Code." It seems to me that this language used by Mr. Logan applies exactly to the transaction before us. This Pulayan was, on the evidence, sold and bought with his full consent. His personal history is as follows: He is 25 years of age. His father worked under the 2nd accused. He himself began to work for the 2nd accused when he was about 12 years of age receiving 3 nazhis of paddy on days when he worked; and he continued to work for this man until he executed Exhibit A to the 1st accused, except for a short time when he went to Wynaad under the orders of the 2nd accused to work there 'under the Sahibs'. He only stayed in the Wynaad a month and came back under orders from the 2nd accused. That is his own account given in his evidence before the Court as prosecution 1st witness. His statement is corroborated by prosecution, 2nd witness, his uncle, who states that prosecution 1st witness began to work under the 2nd accused between the age of 10 and 15, and remained with him until he went to the 1st accused. This man states his view of the position of his caste as follows:—"I work under Kunnumayil Tambiran. I have never worked for any one else. All my sons and daughters work for Kunnumayil Tambiran. My father worked for Kunnumayil Tambiran. If any of us wished to go and work for any other master we could not do so. If Kunnumayil Tambiran consented, they could go and work for another master for a day. If Kunnumayil Tambiran made them over to a new

master they could work under him. They need not go to a new master unless they liked. If they consented to go to a new master he would then be the permanent master and they would always have to obey his orders. I have never heard of our master handing over his cherumas to another master like that. " The Adhigari endeavoured to minimise this condition of service, but even he in answer to the Court admits "so far as I have noticed, cherumas leave their masters only after getting their permission to do so. " Some light is thrown on the view taken by the 1st accused himself of his rights as purchaser by the evidence of prosecution 11th witness. He states that, in consequence of a complaint made to him by prosecution 1st witness's wife who was working for him, he went to the house of the 1st accused and found prosecution 1st witness tied to the leg of a cot in the outer verandah. He asked him for an explanation and the 1st accused said " I tied him up because he does not come and work for me. " Taking the evidence of prosecution 2nd witness an old man as proving the custom among this caste, it appears to me that there is only one matter in which the condition of these people at the present day differs from that of slavery 50 years ago, namely that, the Pulayan need not go to a new master unless he likes. Even assuming that this right is generally recognised, we get the position stated by Mr. Logan to exist in 1887, that they are still, with their full consent, bought and sold and hired out. No evidence was given as to rights in the offspring of the Pulayan, but the evidence shews that the children do work for their father's master and it is difficult to suppose that the language used in this document "giving you Vellan with his heirs", "you should get work done for you by the aforesaid Vellan and his offspring" do not represent actual existing conditions. I am satisfied, therefore, that there is nothing in the conditions of service of these Pulayans to detract from the obvious intention of the document and in my opinion the case is on all fours with the case in *Amina* v. *The Queen Empress* [1] and following that decision I am clear that the offence under S. 370 has been made out. With regard to sentence, being satisfied as I am, that this document only puts on paper the general practice of dealing with these Pulayans, and that the amount of consideration for the sale was almost nominal, I consider the sentence unnecessarily severe. I have no doubt that the 1st and 2nd accused believed

1. (1884) I.L.R. 7 Mad. 277.

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that they were exercising their lawful rights. This is indeed proved by the fact that the 1st accused actually brought a suit against the 2nd accused on this document and, what is still more extraordinary, found a pleader who was prepared to appear for him. In these circumstances, I would reduce the sentences to the period of imprisonment already undergone and a fine of Rs. 100 each, in default, two months simple imprisonment.

[Under S. 429 Criminal Procedure Code the case came on for hearing before Ayling, J.]

The accused not represented.

J. C. Adam for Public Prosecutor.

The Court delivered the following

Ayling, J.

Judgment:—*Ayling, J.*—The case has been so exhaustively dealt with by the learned Judges who heard the appeals (not to mention the very careful judgment of the Sessions Judge) that it is unnecessary for me to set forth the particulars or the arguments for and against the convictions. I shall therefore confine myself to stating briefly the conclusions to which I have arrived after the best consideration I could give to the matter.

The difficulty of decision arises chiefly from the lack of definition of the term "slave" as used in S. 370 of the Indian Penal Code. Both the learned Judges have held, (and I entirely agree) that it includes something very far short of slavery in its most extreme forms wherein the master has absolute and unlimited power over the life, fortune and liberty of the slave. This is clearly the view of the Courts in the two reported cases in which the question is discussed (*Empress of India* v. *Ram Kuar* [1] and *Amina* v. *Queen Empress* [2].) What it does require is not so easy to say. To quote from the judgments of the Allahabad Full Bench in the first named case, Oldfield, J. says that S. 370 of the Indian Penal Code and the cognate sections were intended for the suppression of slavery "in any modified form, where an absolute power is asserted over the liberty of another." Stuart C. J., puts it somewhat differently and regards S. 370 as directed against "attempts to place persons in the position of slaves, *or to treat them in a way which is inconsistent with the idea of the person so treated being free as to his property, services or conduct in any respect.*" If much stress is laid on the word "absolute" in Oldfield, J's definition, it may be argued that the latter is narrower and stricter than that of Stuart, C. J. On the other hand

1. (1880) I. L. R. 2 All. 723. 2 (1884) I. L R. 7 Mad. 277.

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the learned Judges do not seem to have been conscious of any material difference of view and their judgments are treated by a Bench of this Court in *Amina* v. *Queen Empress*[1] as a consistent and homologous interpretation of the law which should be followed, I shall not venture on an independent definition of my own but would prefer to deal with the case in the light of both those above quoted—although this may involve somewhat detracting from the force of the word "absolute" in the first and of the penultimate word "any" in the second. As a matter of fact, the circumstances of this case as I view them would justify the application of either definitions taken singly.

Mr. Adam, who appeared for the Public Prosecutor has argued and I think, rightly, that in determining the nature of the transaction, the Court should look primarily to the terms of the document in which it is embodied and secondarily to the surrounding circumstances as indicating whether the parties had in mind something different from what is set-forth in the document. In a Civil Court, S. 91 of the Indian Evidence Act would probably be a bar to such a course, if the terms of the contract were in question: but in connection with a criminal charge, in which the intention of the accused persons has to be established, it is surely legitimate to look outside the terms of the document, and this course has been followed both by the Sessions Judge and by the learned Judges in appeal.

Looking then to the words of Exhibit B, this document appears to me to evidence nothing more nor less than the sale of Vellan and his offspring as mere chattels. The word, 'Jenmam' is defined in Gundert's Malayalam Dictionary as meaning "hereditary proprietorship" and is the same term used in reference to land held in fee simple or subject only to the payment of Government Revenue. The double reference to Vellan's "heirs" and his "offspring, that may come into being" strengthens the conclusion. The phrases used, *mutatis mutandis*, would be not inapplicable to the sale of a cow and its calf, born or unborn: and I do not think this conclusion is affected by the clause specifying that the vendee should get work done by the said Vellan and his offspring.

If we confine our attention to the terms of Exhibit B, I think it can only be viewed as a sale of the man as if he were a

1. (1884) I. L. R. 7 M. 277.

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beast and as certainly satisfying either of the definitions of the learned Judges in the Allahabad Case.

I pass to the other circumstances of the case, as throwing light on what the parties had in mind. In favour of appellants, may be mentioned the comparatively mild terms of Vellan's service under 2nd accused as described by him in his evidence. I agree with Abdur Rahim, J. that there is nothing in 2nd accused's treatment of Vellan up to May 1913, indicative of slavery in even a modified form. Vellan received the ordinary wages for his work and spent them as he liked; he was not allowed to work for others, but his master prevented him from doing so by the simple expedient of giving him a job of work of his own whenever Vellan wanted to go elsewhere. This, however, is hardly conclusive. 2nd accused may have been a lenient master as long as things went smoothly: but it is of more importance to consider his conduct, when the servant chose to assert his independence. This happened in May 1913, when Vellan who had got into debt, executed a bond, Exhibit A, binding himself in consideration of a loan of Rupees 8 to work for 1st accused only instead of his old master. The terms of this document are so stringent as to practically bind Vellan to 1st accused's service for life without hope of redemption.

Now what was 2nd accused's conduct at this juncture? It is described by Vellan himself as prosecution 1st witness: his evidence is accepted by the Sessions judge and I do not gather that either of my learned brothers took a different view of the evidence of this or the other prosecution witness. Certainly for my own part, I see no reason to differ from the Sessions Judge's appreciation of the evidence. According to prosecution 1st witness, 2nd accused at once objected to the payment of the Rupees 8, the loan under Exhibit A, and announced his intention of selling prosecution 1st witness out and out to 1st accused ("I shall execute a jenmam document selling you to Koroth Mammad and get money for it"). Apparently no money at all was advanced under Exhibit A, then or later although an *exparte* decree was subsequently passed on it (Exhibit J); but for the consideration therein provided for and an extra Rupees 2 all paid to himself, 2nd accused executed the jenmam sale, evidenced by Exhibit B. Prosecution 1st witness ssys "after the sale, 2nd accused said to me 'I have no more right in you.' He made me over to 1st accused and handed over the document."

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"2nd accused said to 1st accused, I shall execute a jenmam deed to you for this Cheruman, you need not pay the consideration for the advance document" (Exhibit A). "After 2nd accused received the money and went away, 1st accused said to me 'My fine fellow I have bought you in jenmam.' I said 'I don't understand what you mean.' He said 'You don't understand because you are uneducated'."

If this account be true, there is nothing in the surrounding circumstances to detract from the effect of the terms of Exhibit B: and the intention of the parties at the time of the latter's execution is what we have to consider—not the treatment of prosecution 1st witness at an earlier period.

All the evidence on record as to what followed is adverse to the defence: it goes to show that 1st accused beat Vellan, tied him up like an animal that had strayed, and behaved generally in a manner not dissimilar to that of a master of a slave in the most primitive sense. I attach no undue weight to this; it has only very secondary bearing on 1st accused's intentions at the time of the bargain and none on that of 2nd accused. But in so far as it is relevant at all it is certainly against the defence theory of the transaction set up on 1st accused's behalf. The fact that 1st accused was subsequently so foolish as to sue on Exhibit B. has no significance. No doubt he had never heard of S. 370 of the Indian Penal Code and did not realise that he had brought himself within the scope of the Criminal Law. But ignorance of law is no defence: and the only intention required by S. 370 of the Indian Penal Code is in relation to the position of the persons bought and sold. 2nd accused has elected to deny the whole story—his execution of Exhibit B, and even the fact that Vellan was any time his servant. I have no hesitation whatever in rejecting this defence as false.

I agree with Mr. Justice Napier, and concur in the order proposed by him.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE SRINIVASA AIYANGAR.

M. Kandaswami Chetty ... *Appellant* (Defendant)*

v.

P. Subramania Chetty ... *Respondent (Plaintiff)*

Kandaswami Chetty v. Subramania Chetty.

Civil Procedure Code, O. 39, R. 2—Temporary injunction in mandatory form—Issue of—Jurisdiction—Specific Relief Act—S. 53—Effect.

By virtue of O. 39, R. 2 of the Code of Civil Procedure, Courts in this country have the power to issue temporary injunctions in mandatory form.

Opinion of Beaman, J., in *Rasul Karim* v. *Prubhai Amirbhai* [1], dissented from. *Champsey Bhimji & Co* v. *Jumna Flour Mills Co.* [2], *Israil* v. *Shamser Rahman* [3], referred to.

On the merits their Lordships held that the case was not a fit one for the sue of a temporary injunction in mandatory form.

Bonner v. *Great Western Railway Co.* [4], followed.

Appeal against the order dated the 26th day of February 1917 of the City Civil Court, Madras in C. M. P. No. 1652 of 1916 in O. S. No. 460 of 1916.

T. R. Venkatarama Sastri (*Messrs. V. S. Govindachariar* and *V. S. Kallabiran Aiyangar* with him) for the Appellant.

Messrs. Short and *Bewes & Co.* for the Respondent.

The Court delivered the following

Judgment :—Upon the question whether Courts in this country have the power by virtue of O. 39, R. 2 of the Code of Civil Procedure to issue temporary injunctions in mandatory form, we are not prepared to adopt the opinion expressed by Beaman, J., in *Rasul Karim* v. *Pirubhai Amirbhai* [1].

The description of temporary injunctions in S. 53, Specific Relief Act does not exclude injunctions of a mandatory nature, and in *Israil* v. *Shamset Rahman* [3], upon an application for an *interim* injunction, pending the disposal of a suit it was ordered that defendant should not only be restrained from further erection of a building but that he should pull down so much of it as he had erected after he became aware of the institution of the plaintiff's suit. We also may observe that Shah, J., did not agree with the opinion of his learned brother in *Rasul Karim* v. *Pirubhai Amirbhai* [1], and that the other Judges of the Bombay High Court

* C. M. A. No. 64 of 1917. 26th March, 1917.

1. (1914) I. L. R. 38 B. 381.
2. (1914) 16 Bom. L. R. 566.
3. (1913) I. L. R. 41 C. 436.
4. (1883) L. R. 24 Ch. D. 1.

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took a different view from Beaman, J., in *Champsey Bhimji & Co.* v. *Jumna Flour Mills Co.* [1].

On the merits however we are of opinion that the present was not a case of such urgency as to make it necessary for the protection of the plaintiff's rights that the defendant should be made to remove the screen put up by him before the rights of the parties were heard and determined in the regular suit which was filed for this very purpose. The facts of this case resemble those of *Bonner* v. *Great Western Railway Co.* [2], in which a temporary injunction was disallowed.

The question of what rights the plaintiff possessed to light and air through the window which the defendant blocked by his screen might very well have been left to be decided in the suit without anticipating the result of it. We allow the appeal. Each party will bear his own costs in this Court.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE PHILLIPS.

Mayarkara Ellath Narayanan Moosad ... *Petitioner** (*Ctr. Petitioner*).

v.

Koori Kathil Itticherry Amma ... *Respondent* (*Petitioner*).

Illath Narayanan Moosad v. Kathil Itticherry Amma.

Criminal Procedure Code, S. 488—Application by mother for maintenance for her child—Decree of civil courts declaring that the child was not born to the person alleged to be its father—Release of right to maintenance by the mother—Effect of.

A Magistrate passed an order under S. 488 of the Criminal Procedure Code, directing the petitioner to pay a sum of money every month for the maintenance of a child of which the petitioner was alleged to be the father, in spite of the fact that a competent Civil Court had declared that the child was not born to the petitioner and that the mother of the child who now applied for maintenance on its behalf, had executed a registered release deed in favour of the petitioner giving up the claim to maintenance for a consideration of Rs. 200.

Held, that the Magistrate ought to have held that the prior decision of the Civil Court was conclusive on the question of the relationship between the child and the petitioner and should have refused to pass any order for maintenance.

Mahomed Abid Kumar Kadar v. *Ludden Sahiba* [3], 2 Weirs Crl. Rulings 614; 2 Weir Crl. Rulings 615, Ref.

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* Crl Rev. Case 293 of 1917. 30th August 1917.
Crl. Rev. Petition 236 of 1916.

1. (1914) 16 Bom. L. R. 566.
2. (1883) L. R. 24 Ch. D. 1.
3. (1886) I. L. R. 14 C. 276.

Illath Narayanan Moosad v. Kathil Itticherry Amma.

Deraji Malinga Naika v. *Marati Kaveri* [1], *Ghana Kanta Mohanta* v. *Gereli* [2], *Nur Muhammad* v. *Ayesha Bibi* [3], referred to.

Held further, that the mother having given a registered release deed in favour of the petitioner, giving up the claim for maintenance, she was not entitled to an order for maintenance.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Palghat Division in Misc. Case No. 125 of 1916.

K. R. Subramania Sastri, Vakil for the Petitioner.

Public Prosecutor on behalf of the Crown,

The Court made the following

Sadasiva Aiyar, J.

Order :—*Sadasiva Aiyar, J*, :—The petitioner in revision, Narayana Moosad, was at first directed by the Magistrate to pay Rs. 15 a month for the maintenance of the respondent's (Itticheri Amma's) elder child who seems to have been born in 1914. This order was passed on 12-5-1916, notwithstanding the petitioner's denial that he kept or married the woman or that the child was born to him. Against that order there was a previous revision petition to this court (Crl. Revision Case No. 491 of 1916), and the Magistrate's order was set aside by Mr. Justice Spencer on 4-12-1916, in order that the Magistrate might consider the circumstances of the woman's tarwad and then fix the maintenance.

Pending this maintenance case before the Sub-Divisional Magistrate, the petitioner filed a suit (O. S. No. 295 of 1916) in the District Munsif's Court of Tirur for a declaration that the plaintiff was never his wife and the child was not born to him and for another relief (not relevant to this case). That declaration was granted by the District Munsif. When the Criminal maintenance case came up again before the Sub-Divisional Magistrate the petitioner produced the judgment and decree of the District Munsif and requested the Magistrate to drop all further proceedings in the maintenance case. The Magistrate refused to do so and passed a fresh order on 3-4-1917 directing the petitioner to pay the complainant, Itticherri Amma, a sum of Rs. 8 permensem for the maintenance of the boy, Krishnan and another sum of Rs. 7 for a child named Parvathi, aged 9 months, that child having been in the womb when the first order of the Magistrate (12-5-1916) was passed.

1. (1907) I. L. R. 30 M. 400. 2. (1904) I. L. R. 32 C. 479.
3. (1905) I. L. R. 27 A. 483.

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The learned Magistrate affirms his finding that the complainant was kept by the petitioner and the first child was born to him. And one of his reasons is that the petitioner made an attempt to compromise the complainant's claim and obtained a release deed, Exhibit I, from her for a consideration of Rs. 200. Though the petition No. 20 of 1916 (which seems to have been numbered after the remand as 125/1916) prayed for allowance for the maintenance of the elder child alone, the Magistrate, as I said before, has given her Rs. 7 for the maintenance of the younger child born about July 1916. In the evidence of the complainant taken again on the 30th January 1917, the complainant says "The second delivery was after the former case. I claim maintenance for the second child. Accused is the father. It is a female child." She admits in her evidence that she executed the release deed, Exhibit I, because he threatened steps against her civilly and that she also got a promissory note for Rs. 150, Exhibit A from the petitioner. Then she says "If this court passes an order of maintenance, I do not want the pro-note". There is nothing to show the rate at which she claimed maintenance for the second child or that the petitioner was called upon to show cause why he should not pay maintenance for the second child or to state what, according to him, would be a reasonable rate of maintenance. The learned Sub-Divisional Magistrate has ordered the Rs. 15 which he had in his first order, allowed for the maintenance of the eldest child to be now treated as the maintenance rate for both children dividing it into 8 and 7. As to why the learned Sub-divisional Magistrate refused to accept the District Munsif's decree declaring that the complainant was not the petitioner's wife nor was the child born to him, the Magistrate makes the following observations: "At the risk of pronouncing an *obiter dictum* I cannot help remarking that the possibility of such thing happening" (namely, a Civil Court declaring the petitioner not to be the father of the child and granting him damages for bringing a false complaint and the petitioner inducing the High Court to order the Sub-Divisional Magistrate to retry the case) "does not-conduce to the dignity of justice either Civil or Criminal *some means of co-ordination should exist.* In this case the procedure of this court by comparison with that of the Civil Court is certainly not summary. I understand that the Munsif is now engaged in revising his own

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order." I might here add that the learned Sub-Divisional Magistrate himslf has revised his former order because he says in paragraph 7 of the present order "The sum of Rs. 15 is perhaps rather excessive for one child." I understand that the District Munsif dismissed the review petition put in by the complainant in the civil case.

As regards the comparison indulged in by the learned Sub-Divisional Magistrate between the procedure of his court and the procedure of the District Munsif's Court, it seems to me not relevant and I may perhaps be permitted to state that the manner in which the Sub-Divisional Magistrate has on the bare statement of the complainant in the witness-box in January 1917 allowed her a sum of Rs. 7 for the maintenance of the second child whose maintenance was not the subject of the complaint shows that his procedure is rather summary. The learned Magistrate is quite right in saying that some means of co-ordination should exist between the Civil and Criminal Courts. I think that such means of co-ordination has been laid down by competent authorities long ago. In *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba* [1] decided by Mr. Justice Prinsep (a very learned Civilian Judge of High authority in criminal matters) and Mr. Justice Beverley, which was argued by Mr. Amir Ali for the lady who claimed maintenance, the learned Judge states as follows:—"Having found" (in the civil litigation) "that the relationship of husband and wife no longer exists between the parties, it remains for us to consider the effect of our finding on the proceedings before the Magistrate. The plaintiff asks for an injunction to restrain the Magistrate from enforcing the order for maintenance. We are of opinion that we cannot pass such an order. The plaintiff will be at liberty to satisfy the Magistrate that, by an order of this court in its civil jurisdiction, it has been declared that no relationship exists between him and the defendant and he can ask the Magistrate on the authority of the cases of *Abdur Rahiman* v. *Sakhina* [2] and *In re Abdul Ali Isumailji* and *Husenbi* [3] to abstain from giving any further effect to his order for maintenance." In 2 Wier 614, the Magistrate passed on order for maintenance and then a suit was brought and the District Munsif's court cancelled the order

1. (1886) I. L. R. 14 C. 276. 2. (1879) I. L. R. 5 C. 558.
3. (1883) I. L. R. 7 B. 180.

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of the Magistrate. The learned Judges say "it is obvious that the District Munsif had no jurisdiction to entertain a suit for such a purpose. The decree can only enure as a decree *inter partes determining the right of the parties inter se,* but not directly affecting the order of the Magistrate *which the High Court alone are empowered to set aside.* What the District Munsif decided was that the woman had been living apart from the husband for more than 12 years. It is not decided that she did so voluntarily, nor is it found that she has been living an unchaste life or has done anything to dissentitle her to maintenance. *If it had been so decided, the Magistrate* who passed the original order *would have been bound in the interests of justice to take the judgment into consideration* before passing a fresh order to enforce the former order, because such a decision would, as between the parties, *be strong if not conclusive evidence* of what it decided." In this decision of September 1877, the question was not finally decided as it was unnecessary to decide it for the purposes of that case. Then we come to the case noted in the very next page 615 which was decided by Wilkinson and Shephard, JJ., in August 1889. I shall quote the whole of the judgment as this has always been considered as laying down the law in Madras: "By the decree made by the District Munsif of Palghat in February 1889, the plaintiff Veeran is declared not to be liable to pay separate maintenance to his wife. The orders for such maintenance previously made by the Head Assistant Magistrate did not take away the jurisdiction of the Civil Courts to make the declaration, under S. 42 of the Specific Relief Act. *The Munsif's decree being final, it is binding upon the parties to it and the husband is entitled to insist that the Magistrate does not enforce the order of maintenance,* which assumed that the obligation negatived by the decree existed. *It is not open to the Magistrate to ignore a final decree on the ground that it rests on reasons which do not appear to him satisfactory,* the jurisdiction vesting in him under S. 488 of the Criminal Procedure Code being auxiliary to that of the Civil Courts. *The order of the Magistrate must be cancelled* on the ground that there was no sufficient reason for the wife to refuse to live with the husband and that the decision of the District Munsif is *conclusive on that point.* This will not, however, preclude the interference of the Magistrate, if there should arise any fresh causes for such interference." I shall

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now consider the case of *Deraje Malinga Naika* v. *Marati Kaveri* [1], decided by Sir Arnold White, C. J., and Mr. Justice Miller. The cases *Veeran* v. *Ayyammah* [2], and *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba* [3], are referred to, approved and followed. It distinguishes the case of *Subhudra* v. *Basdeo Dube* [4]. In *Syed Saib* v. *Meeran Bee* [5], Munro and Abdur Rahim, JJ., held that "the Magistrate is bound to abstain from enforcing his previous order for maintenance when it is once established that the relationship of husband and wife ceased to exist since the date of the order." *In Ghana Kanta Mohanta* v. *Gereli* [6] it was held in the converse case that the Magistrate's finding against the sonship of a person for whom maintenance was claimed by the mother was not a bar to a suit in the civil court to establish the sonship and to recover maintenance. (See also *Trinayani Dasee* v. *Srichandan Bhuiya* [7]). In *Nur Muhammad* v. *Ayesha Bibi* [8], Mr. Justice Aikman following *In re. Bulakidas* [9], says that "a decree of a civil court for restitution of conjugal rights passed after an order of maintenance in favour of the wife *superseded the maintenance order and ought to be cancelled and we accordingly cancel it.* I am therefore clear that the learned Magistrate ought to have, in the language of the case in 2 Weir 615, held that the decision of the District Munsif is conclusive on the question of relationship as declared by that decree and should have refused to pass any order for maintenance. His order is therefore cancelled in the exercise of the powers of this Court under S. 439 of the Criminal Procedure Code. I might add that the woman having given a registered release deed Exhibit I and obtained the promissory note Exhibit A and her evidence clearly showing that she refused to be bound by the agreement only, because she expected an order from the Magistrate more favourable than she got under the release, (she was not willing to give up her claim under the promissory note unless she got maintenance order from the Magistrate), the learned Magistrate ought to have dismissed her petition on that ground. (See also *Veeramma* v. *Narayya* [10].)

Phillips, J.

Phillips, J.:—On the ground that the Joint Magistrate has failed to consider the effect of the agreement between the parties

1. (1907) I. L. R. 30 M. 400
2. (1889) 2 Weir 615
3. (1886) I. L. R. 14 C. 276.
4. (1895) I. L. R. 18 A. 29.
5. (1909) 20 M. L. J. 12.
6. (1904) I. L. R. 32 C. 479
7. (1912) 15 I. C. 603.
8. (1905) I. L. R. 27 A 483
9. (1898) I. L. R. 23 B. 484.
10. (1883) I. L. R. 6 M. 283.

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evidenced by Exhibits A and I (vide *Subuddhi* v. *Jamuna Bai.* 2 Weir's Crl. Rulings 631) and on the ground that the Magistrate's order was passed after the decree of the District Munsif I agree in the order proposed. The suit in which the District Munsif's decree was passed was filed after the original maintenance order had been passed and the District Munsif was clearly wrong in awarding damages to petitioner against respondent on the ground that the latter had obtained a maintenance order from the Magistrate for it has been repeatedly held that a Civil Court cannot pass a decree interfering with a prior maintenance order by way of injunction or other similar order (*Deraji Malinga Naika* v. *Marati Kaveri* [1], *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba* [2].). The District Munsif's decree had the effect of nullifying the prior magisterial order, and I am not prepared to hold on the very limited arguments in this case that a party can get a magisterial order for maintenance set aside by a civil court when there has been no change of relationship between the parties between the date of the order and the date of suit. (*Vide Subhudra* v. *Basdeo Dube* [3].) In the other cases such as *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba* [2], and *Abdur Rahman* v. *Sakhina* and *In re Abdul Ali Ismailji* [5] the relationship between the parties had altered; and in *Nur Mahomed* v. *Ayesha Bibi* [6], the civil decree was a consent decree which provided for the maintenance, and in no decided case to which I have been referred has a maintenance order been allowed to be set aside by a decree based upon the same facts and material as the magisterial order.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE SRINIVASA AIYANGAR.

Panchapagesa Odayar and another ... *Appellants* (Defendants)*

v.

Kanaka Ammal and another ... *Respondents (Plaintiffs).*

Panchapagesa Odayar v. Kanaka Ammal.

Hindu Law—Maintenance—Permanent concubine—Right to maintenance from the family property of deceased paramour—Illegitimate son.

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*A. S. No. 121 of 1916. 8th January 1917.

1. (1907) I. L. R. 30 M. 401.
2. (1886) I.L. R. 14 C. 276.
3. (1895) I. L. R. 18 A 29.
4. (1879) I. L. R. 5 C. 558.
5. (1883) I. L. R. 7 B. 180.
6. (1905) I. L. R. 27 A. 483.

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An illegitimate son of a deceased Hindu, born of his permanently kept concubine, has a right of maintenance against the family property of which his putative father was a co-parcener. Similarly, a permanently kept concubine of a deceased Hindu has a right to be maintained from the family property of which her paramour was a co-parcener.

Authorities on the subject reviewed.

Appeal against the decree of the court of the Subordinate Judge of Kumbakonum in O. S. No. 35 of 1914.

T. Rangachariar for the Appellants.

T. R. Venkatarama Sastriar with *S.T. Srinivasagopalachari* for the Respondents.

The Court delivered the following

Judgment:—The 1st appellant, the 1st defendant in the suit is an undivided brother of one Venkataramana Oodayan who died in October 1908 and the 1st respondent, the 1st plaintiff claims to be the permanent concubine of Venkataramana Oodayan and the 2nd respondent (the 2nd plaintiff) is a child by the 1st plaintiff and claims to be the illegitimate son of Venkataramana Oodayan. The suit was one for maintenance. The Subordinate Judge has given a decree awarding as maintenance Rs. 20 a month to the 1st plaintiff for life and Rs. 20 a month to the 2nd plaintiff till he attains majority. Mr. T. Rangachariar appearing on behalf of the appellants has contended that it is not proved that the 1st plaintiff was the permanent concubine of Venkataramana or that the 2nd plaintiff was his son. [Their Lordships then discuss the evidence.] * * * *

We therefore agree in the conclusion of the Subordinate Judge that the 1st plaintiff was in the exclusive keeping of Venkataramana until his death and that the 2nd plaintiff is his son. We ought to observe however that in dealing with the evidence of a witness for the defence, the Subordinate Judge has thought fit in his judgment, paragraph 15 to make certain observations regarding the witness, of an entirely personal character which must be characterized as wholly improper. Such remarks are not fit to be made by any judicial officer and this must be pointed out to the Subordinate Judge.

On the question of law that arose in the suit, Mr. Rangachariar had to admit that so far as the 2nd plaintiff's right to maintenance is concerned, all the authorities are against him the latest on the point being *Subramania Mudali* v. *Valu* [1] following a number

1. (1910) I. L. R. 34 M. 68.

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of earlier decisions on the subject. But he has strenuously argued before us that a concubine is not entitled under the Hindu law to maintenance as against the family property of the person keeping her. But it would seem that all the authorities on this question are opposed to Mr. Rangachariar's contention. We have a series of decisions of the Bombay High Court—*Khemkor* v. *Umiashanker* [1], *Vrandavandas Ramdas* v. *Yamuna Bai* [2], *Yashvantrav* v. *Kashibai* [3], *Ningareddi* v. *Lakshmawa* [4]—all of which recognise the right of a permanent concubine to maintenance from the estate of her deceased paramour. There is one reported case of this Court also which recognised a similar right, *Ramanarasu* v. *Buchamma* [5]. In this last case, the question for decision was whether a concubine who is kept by a Hindu has a right of maintenance against him during his life time. That claim was negatived but it was assumed as indisputable that if till his death, the woman was in his keeping, she would be entitled on his death to maintenance as against his property. The original authorities which are referred to in these judgments support this view. But it is argued on behalf of the appellants that although a concubine with whom the relations were of a permanent character is entitled on the death of her deceased paramour to maintenance from his estate, that right does not extend as against the family property of which her paramour was a co-parcener. But we do not think that this distinction is sound. At any rate in one Bombay case, *Vrandavandas Ramdass* v. *Yamuna Bai* [2], maintenance was allowed as against the undivided nephews of the person who kept the woman. In *Yashvantrav* v. *Kashibai* [3], which was a decision of Sir Charles Sargant, C. J., and Nanabhai Haridass, J., it is held that the word "woman" in the text had been interpreted by commentators and judicial authorities to include a 'concubine'. In the text of Mitakshara, Chap. II, Sec. 1, the relevant placita bearing on the point are 7, 27 and 28. In placitum 7, the right of a widow to maintenance as against her husband's brother who takes the property is established. The word used in that placitum is '*stri*'. But in placitum 28 it is expressly stated that in the text of Narada which is quoted in placitum 7, the word *stri* includes "concubine".

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1. (1873) 10 Bom. H. C. R. 381.
2. (1875) 12 Bom. H. C. R. 229 at 231.
3. (1887) I. L. R. 12 B. 26.
4. (1901) I. L. R. 26 B. 163.
5. (1899) I. L. R. 23 M. 282=10 M. L. J. 2.

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Mr. Rangachariar however suggests that as placita 27 and 28 deal with the case of escheat to the Crown in default of heirs to a deceased Hindu, we must read the explanation of Narada's text as given in placitum 28 as being confined to those cases alone. But there seems to be no sufficient reason why we should put that restrictive interpretation. At any rate all the authoritative writers of text books on Hindu Law have understood the text of Mitakshara as interpreted by the Bombay High Court. See Strange's Hindu Law, Vol. 2, 174, I, West and Buhler 92, 93 and Mayne's Hindu Law 620. There seems to be no reason therefore for accepting a view which is contrary to all judicial authorities and the text writers.

The appeal must therefore be dismissed with costs.

The memorandum of objections raised a question as to the amount of maintenance. The property belonging to the family is very large and valuable yielding an income of about Rs. 40,000 a year. Venkataramana left two widows and the other co-parcener is the 1st appellant. The Subordinate Judge has allowed Rs. 20 a month to the son for maintenance till he attains majority. He will attain majority in about a year's time. But the first plaintiff has to maintain not only herself but two young daughters aged about 7 and 9 years and it seems to us that Rs. 20 is hardly adequate provision for her. Having regard to the value of the family property, we think we will be justified in increasing the allowance in her case to Rs. 40 a month. We may mention that the daughters are not parties to the suit and we do not decide any question as to their right of maintenance if they have any against the estate in the hands of the 1st defendant. The respondents are entitled to proportionate costs of the memorandum of objections both here and in the lower Court. The 1st plaintiff is entitled to recover arrears of maintenance at Rs, 40 a month.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE NAPIER.

Anantanarayana Iyen ... *Appellant* * (*2nd Plaintiff.*)

v.

Khozhikote Patinhare Kovilakath Thiruveerarayan *alias* Thampan Thamburan styled the present Edathrapad 4th Rajah of Calicut and others. *Respondents* (*Supplemental Respondent and Defendants 5 and 1 to 4.*)

Anantanarayana Iyen *v.* Patinhare Kovilakath Thiruveerarayan.

Malabar Law—Stanam—Melcharat by stani when binding on successor.

A melcharat for 12 years granted by a Stani is *prima facie* binding on his successor, but it may be avoided on proof that it was not granted in the ordinary course of business, or that a proper and reasonable rent was not reserved.

Cases on the subject considered.

Second appeals against the decrees of the Court of the Subordinate Judge of South Malabar at Palghat in A. S. Nos. 455 to 457 of 1915, preferred against the decrees of the Court of the District Munsif of Alattür in O. S. Nos. 447, 449 and 448 of 1914.

K. R. Subramania Sastri and *K. P. Ramakrishna Aiyar* for Appellant.

A. S. Venku Aiyar and *P. V. Paramaswara Aiyar* for Respondents.

The Court delivered the following

Napier, J.

Judgments :—*Napier, J.*—This is a suit by a melcharatdar from the Stani the 4th Rajah of Calicut to recover from certain persons in possession of land under Verampatum lease, the properties demised in the melcharath. The melcharatdar is the 2nd plaintiff the demisor being the 1st plaintiff. The 5th defendant in the suit is a person to whom a melcharat had been granted by the predecessor of the 1st plaintiff with respect to the same properties and the plaintiffs claim that that demise was bad and not binding on the present 1st plaintiff as having been given without any consideration and for the purpose of depriving the 1st plaintiff of his lawful income and not for the purpose of the stani. This question was made the subject of the 7th issue, namely, "whether the lease relied on by the 5th defendant is valid and binding on the plaintiff." We have already held in S. A. Nos. 581, 582 and 608 of 1916 that the property was held by

* S. A. Nos. 1044 to 1046 of 1916. 7th March 1917.

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Napier, J.

the defendants in possession on a Verumpatum lease and that they were therefore liable to surrender it. But the question we have to decide in this case is whether the prior melcharath granted to the 5th defendant is valid because, if so, the present 2nd plaintiff has no title on which he can sue. The matter was considered carefully by the District Munsif who held that the first melcharath was good. But it has bee pointed out to us that the lower Appellate Court has not given an finding on this issue No. 7, having overlooked the necessity for it as the Court dealt with these cases and the prior cases S. A. Nos. 581 to 582 and 608 of 1916 in the same judgment.

The point urged by Mr. Subramania Sastri is really a point of law although it has to be applied to the facts of this case and as we have those facts before us and as they are not really in dispute, we propose to act under S. 103 of the Code of Civil Procedure and determine this issue ourselves. The argument put forward by Mr. Subramania Sastri is that anything beyond a lease for a single year by a stani is voidable unless it has been shown to have been for the necessity of the stani. And he has invited our attention to a long series of cases beginning with two of the Sudder Adawlat Court. Those two cases are quoted in Moore's Malabar Law p. 353 the subject being dealt with by the learned author from p. 348. We do not think that those two cases really lay down anything in the way of a general proposition. They seem to me to have been decided on the facts of each case and are cases where a Zamorin practically on his death-bed and a Rajah of Palghat who had just suffered from a paralytic stroke endeavoured to defraud the person who would come into possession of the estate in a few months of the whole of what he might legitimately expect to get from the property. Great reliance has naturally been placed by Mr. Subramania Sastri on the decision of the Privy Council in *Venkateswara Iyan* v. *Shekari Varma* [1] but I do not think that their Lordships intended to lay down that every lease, for however short a term, must be governed by the same rules as they applied in that case. That was a perpetual lease of stanom lands by a Rajah, and their Lordships say with regard to that, "The stanomdar represents the *corpus* of his stanom much in the same way as a Hindu widow represents the estates which have devolved upon her and he may alienate the property for the benefit or proper expenses

1. (1881) I L. R. 3 M. 384.

Anantanarayana Iyen v. Kovilakath Thiruveerarayan.

Napier, J.

of the stanom." Now I think it is clear that in using this language their Lordships were referring to alienations by sale and mortgage by a Hindu widow in circumstances which have been held to be binding on the reversioners, and I do not think that they had in their minds in the very slightest the granting of a lease for the purpose of the cultivation of the stanom property. Even this proposition has been held in a later case not to be of universal application, for it was decided in *Mana Vikraman* v. *Sundram Pattar* [1] that the granting of a perpetual lease is not necessarily bad if it is for the benefit of the stanom and on the facts the court held that the approval of 8 stanis was sufficient to show benefit. In a later case dealing with a perpetual lease, *Mullath Tarwad Karnavan and Manager Katungi Velloti* and others v. *Mullath Unni Nambi alias Kunhunni Velloti* [2], it was laid down that such a lease is presumably beyond the powers of a stani as it amounts to an alienation. Now, I do not think that we have to apply the principles governing these cases at all. It seems to me that in dealing with a lease for 12 years we have to consider the matter from a different standpoint. The property has not been 'alienated', in the broad sense of the word. It remains for the benefit of the stanom and some rent is coming in and in course of time the lease will come to an end, and the new stani get the benefit of the renewal. The tests to be applied to such a case have been considered in two very recent cases—S. A. No. 1874 and 1875 of 1914 and S. A. No. 1449 of 1912. The first of these was a judgment of this Bench and the second a judgment of Sadasiva Aiyar, and Bakewell, JJ. I prefer to take the latter judgment especially in view of the admittedly close acquaintance which one of those learned Judges has with Malabar customs and conditions. It was the grant of a melcharat for 12 years. The learned Judges say as follows.—"The question is whether the previous stani in granting the melcharth to the plaintiff reserved a reasonable rent for the 12 years period, she having only a life interest in the income, and her successor not being bound by a melcharth which was not granted in the ordinary course of business or which did not reserve the proper and usual rent obtainable on renewal." This of course is an entirely different test to that which had been applied to cases of perpetual leases, and in my opinion it is one which we can very

1. (1881) I. L. R. 4 Mad. 118.

2. (1895) 5 M. L. J 213.

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usefully adopt. Applying this test Mr. Subramania Sastri urges that on the facts it is destructive. He points out that these properties were previously granted to the defendan's in possession on Verumpattom tenure, that is, a lease for a year. And he also points out that the properties have been consolidated into one melcharth which has been granted by thes tani to his own nephew. Giving all weight to these considerations, I do not think that these facts are sufficient to bring the case within the mischief of the doctrine laid down, especially as I am inclined to think that in the view of the learned Judges who decided that case it rests on the person who seeks to have the melcharth declared void to show that it is not of a reasonable nature and not granted in the ordinary course of the business. Although it is true that these properties were granted on Verumpattom lease, namely a lease for one year, the fact remains that between the year 1870 and the year 1913 there had only been four leases granted. The first was in 1870 and was renewed in 1881. It was renewed in 1888 and again in 1902, and the property was held under the last lease up to the date of this melcharth, which is 1912. So that, as a matter of fact the same tenant held these properties for periods between 7 and 14 years on the nominal lease for one year. Then as to the question of consolidation, it appears that it is only the last Verumpattom lease that has been split up into three for the previous leases were consolidated and the only reason why three different leases were granted in 1902 was because the holders of the lease had made a partition and the parties desired to have a lease of the property held by each in his own name. So I do not think any importance can be attached to the consolidation. The District Munsif has expressed his opinion that consolidation may be very good business and also that it may be a benefit to the stanom to get a solvent tenant to take the property on a lease instead of having the trouble of yearly lease with the possible insolvency of any lessee at any time. I think there is a great deal of force in this contention and unless it was demonstrated by evidence that the grant of a 12 year lease of this character was so unusual as evidently not to be in the ordinary course of the business, I should not be prepard to hold that was so. On the whole, I have come to the conclusion that there is nothing in this melcharth which offends against the test applied in the judgment of this court in S.A. No. 1449 of 1912, the reasoning of which I adopt,

The result will be that this issue is found against the plaintiff and the suits will have to be dismissed with costs of the tenants (respondents) one set and 2nd respondent one set.

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Ayling, J.:—I agree.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Puthiyapandikasalayil Abdulla Koya ... *Appellant* * *(Plaintiff.)*

v.

Kallumpurath Kanaran (dead) and others ... *Respondents (Defendants and L. Rs. of 1st defendant).*

Abdulla Koya v. Kallumpurath Kanaran.

Limitation Act—Art. 36—Decree in suit for ejectment of tenant in Malabar—Suit by holder of, for compensation for damage done by judgment-debtor to property decreed subsequent to decree—Limitation—Deduction of time spent in prosecuting execution proceedings to obtain same relief—Limitation Act—S. 14—Applicability—Malabar compensation for Tenants Improvements Act—Ss. 5, 6—Intention of Legislature—Court executing decree in suit for ejectment of Malabar tenant—Jurisdiction to award compensation for damage done by judgment-debtor to suit property subsequent to decree—Estoppel—Inconsistent pleadings in successive proceedings—applicability of doctrine to pleas based on abstract question of procedure law—Scope of.

Under Ss. 5 and 6 of the Malabar Compensation for Tenants Improvements Act the Court executing the decree in a suit brought for ejectment of a tenant in Malabar has jurisdiction to entertain an application to award compensation to the decree-holder for damages done to his property after the passing of the decree. *Held*, therefore, in a suit brought by such a decree-holder against his judgment-debtors to recover compensation for damages done by them between the date of the decree and that of the decree-holder's entry upon the property decreed, that the plaintiff was not entitled under S. 14 of the Limitation Act, to a deduction of the time spent by him in prosecuting execution proceedings to obtain the same relief, notwithstanding that the executing court held that it had no jurisdiction to grant that relief.

Per Spencer, J.:—By enacting Ss. 5 and 6 of the Malabar compensation for Tenants Improvements Act, the legislature clearly intended that there should be complete and final settlement between the lessor or mortgagor and his lessee or mortgagee of all that is due from the former to the latter and from the latter to the former up to the date when the transfer of possession takes place and that the subsequent re-opening of accounts between parties whose legal relationship has ceased should be avoided.

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* S. A. No. 859 of 1914. ·nd March 1917.

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The words " any sum of money accruing due for rent or otherwise in respect of the tenancy " in S. 6 of the Act are wide enough to include damages for injury done by the tenants to his mortgagor's or lessor's property, even though the money may not strictly be said to accrue due until the value of the damages has been ascertained.

Per Sadasivaiyar, J.:—*Quaere* whether the doctrine that a party ought not to be allowed to " blow hot and cold " in pleadings in two successive proceedings involving the same question of rights can be availed of as regards pleas based on a pure abstract question of procedure law.

Jagannadha Rao v. *Kurmayya* [1], *Manpal* v. *Sahib Ram* [2], referred to.

Quære:—Whether even assuming that the doctrine can be availed of in such cases its effect is to entitle the party taking the first or infructuous proceeding to a deduction of the time taken therein for the purposes of calculating the limitation period for the second proceeding.

Second appeal against the decree of the Court of the Subordinate Judge of North Malabar in A. S. Nos. 453 and 451 of 1912 preferred against the decree of the Court of the District Munsif of Quilandy in O. S. No, 349 of 1911.

K. Govinda Marar for Appellant.

C. V. Anantha Krishna Aiyar for Respondent.

The Court delivered the following

Spencer, J.

Judgments:—*Spencer, J.*—The plaintiff sued in O. S. No. 150 of 1906 for redemption and possession of two items of property. He obtained a decree on March 9th, 1907 and was put into possession of the property on December 5th, 1908. He brought the suit on June 25th, 1911 to recover compensation for damages done by the defendants both prior to the decree in O. S. No. 150 of 1906 and between the decree and his entry upon the land.

Under Article 36 of the Indian Limitation Act he had two years from the date when the alleged damage was caused to institute his suit, and he is now out of time unless he is allowed under S. 14 to deduct the time between November 6th, 1903 and June 22nd, 1910 spent in prosecuting execution proceedings to obtain the same relief.

As regards the damages caused before the passing of the aforesaid decree, the lower courts were clearly right in refusing to let the plaintiff take advantage of the previous execution proceedings for extending the time under S. 14, for the reason that in those proceedings the plaintiff did not ask to be compensated for loss

1. (1907) 17 M. L. J. 314. 2. (1905) I. L. R. 27 A. 544.

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Spencer, J.

sustained before the decree but expressly reserved his right to make that the subject of a separate application.

As regards the claim on account of damages alleged to have been caused after the decree and before possession was delivered to the plaintiff, the District Munsif in the execution proceedings refused to award compensation under this head as he did not believe the plaintiff's allegations to be true. In appeal the Subordinate Judge did not pronounce on the merits of this claim, and he held that the plaintiff's proper remedy was to proceed not by way of execution but by a regular suit and dismissed the appeal. The plaintiff did not appeal against that order and we are not now sitting in an appeal upon it so as to be in a position to decide whether the plaintiff should have been given the relief sought by him in the Subordinate Judge's Court. We have only to see whether those proceedings were prosecuted in good faith in a court which from defect of jurisdiction or other cause of like nature was unable to entertain it.

Now S. 6 of the Malabar Compensation for Tenants Improvements Act declares that in a suit brought for ejectment of a tenant in Malabar the Court executing the decree shall determine the amount due for compensation for improvements made subsequent to the date of valuation adopted in the decree "as well as any sum of money accruing due to the plaintiff subsequent to the said date for rent or otherwise in respect of the tenancy" and the court shall vary the decree accordingly. Under S. 5, the tenant to whom the compensation is due continues to hold as a tenant until he is ejected. I think the intention of the legislature is clear enough. It was intended that there should be complete and final settlement between the lessor or mortgagor and his lessee or mortgagee of all that is due from the former to the latter and from the latter to the former up to the date when the transfer of possession takes place and that the subsequent re-opening of accounts between parties whose legal relationship has ceased should be avoided.

I also think that the words "any sum of money accruing due for rent or otherwise in respect of the tenancy" are wide enough to include damages for injury done by the tenant to his mortgagor's or lessor's property, even though the money may not strictly be said to accrue due until the value of the damage has been ascertained. The 4th clause of this section makes such matters to be questions falling under S. 47 of the Code of Civil Procedure. In

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this view I consider that the executing court was not incompetent to entertain the application to award compensation to the decree-holder for damages done to his property after the passing of the decree, and therefore that S. 14 of the Limitation Act does not operate in this case to extend the time. The suit is barred. The second appeal should be dismissed with costs.

Sadasiva Aiyar, J.

Sadasiva Aiyar J.:—I agree. I wish to add, however, a few words on a question which though not raised in the Lower Courts or in the grounds of the memorandum of Second Appeal, was argued before us.

Mr. Govinda Marar, Vakil for the appellant, argued (1) that the Subordinate Judge having in Exhibit P. (the decision passed in appeal from the order in E. P. No. 851 of 1908) decided that the question of compensation for damages due to the plaintiff both prior to and after the decree in O. S. No. 150 of 1906, could not be considered in execution proceedings, the defendants are estopped from contending in this suit that the executing court was not incompetent to consider that question and (2) that, so being estopped, the time taken in that incompetent court must be deducted under S. 14 of the Limitation Act at least as regards the relief of compensation for acts done subsequent to the said decree.

As regards the first, it has been no doubt, held in *Mallika Dasi* v. *Makham Lal* [1], *Ramgati Mohurer* v. *Pran Hari Seal* [2] and *Sashi Bhusan Mandal* v. *Rai Sabak Mandal* [3] that a party cannot, as a rule, be allowed to "blow hot and cold" in pleadings in two successive proceedings involving the same question of rights and if by setting up a particular defence, he has induced the court to decide against his adversary in the first proceeding, he cannot in a subsequent proceeding based on his own contention in the former proceeding be allowed to go against that contention. But it is doubtful whether this doctrine can be availed of as regards pleas based on abstract questions of law. Decisions on abstract questions of law are not res judicata between the same parties and if a party can be allowed to "blow hot and cold" (as it is called) on abstract questions of law, I do not see why he should not argue against his own contention on a pure abstract question of procedure law in order to defeat his

1. (1905) 2 C. L. J. 389. 2. (1905) 3 C. L. J. 201.
3. (1914) 24 I. C. 181.

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adversary who, instead of appealing against the wrong decision of the court in the former proceeding on a question of procedure, instituted the fresh proceeding, accepting the former erroneous decision as correct. However, there are cases (see *Jagannada Rao* v. *Kurmayya* [1], *Manpal* v. *Sahib Ram* [2], which hold that even legal contentions as to procedure ought not to be varied in a subsequent proceeding relating to the same matter. Assuming then that a party ought not to be allowed to raise inconsistent contentions as to procedure in successive proceedings, provided that the relief sought by the other party was substantially the same in the prior and the subsequent proceedings, there is nothing in Exhibit P to show that it was on the plea of the defendants that the Subordinate Judge decided against the plaintiff on the question of law whether the executing Court was or was not competent to go into the question of damages for waste. The first contention therefore fails.

As the first contention has failed, it is unnecessary to express a final opinion on the 2nd contention. I shall, therefore, merely notice the arguments contra thereon. The cases quoted already only allow the plaintiff in the subsequent proceeding to adopt as correct the contention which was put forward by the opposite party and which was accepted by the court so as to prevent the opposite party from arguing against his own previous contention. But they do not deal directy with the question whether the time taken in the first or infructuous or unsuccessful proceeding could be deducted for the purposes of calculating the limitation period for the second proceeding and whether the opposite party is estopped also from contending even in arguing this question of limitation that the first proceeding was in a competent court, the question of the court's competency being only a subsidiary question of law which has to be considered for arriving at a decision on the main question of limitation. It is, however, as I said before, unnecessary to express a final opinion on this matter.

A. S. V.

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1. (1907) 17 M. L. J. 314.

2. (1905) I. L. R. 27 All. 544.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER AND MR. JUSTICE SESHAGIRI AIYAR.

Ganesa Seturam, minor by guardian and mother Velliammai .... *Appellant* * (*8th defendant*).

v.

Ramaswami Servai and others ... *Respondents (Plaintiff and Defendants 1, 2 and 4 to 7).*

Ganesa Seturam v. Ramaswami Servai.

Company—Winding up—Liability of the Secretary to pay to the liquidator the sums belonging to the company in his hands—Legal position of Secretary—Agent and not a trustee—Interest—Liability of Secretary to pay—When arises—Liability of the Legal Representative of the Secretary.

Where a company went into voluntary liquidation and the Secretary had in his hands monies belonging to the company and the liquidator subsequently made a demand for the monies and pending a suit for the same with interest the Secretary died and his legal representative was brought on the record, *held*, the Secretary of the company is not a trustee for the amount that he receives on behalf of the company but only an agent.

An agent retaining money which he ought to pay over but which he has not been required to pay is not bound to pay interest on the same from the date of its receipt by him. But when in answer to a demand for the money he denies his liability, from that moment he must be deemed to have retained the money illegally and is bound to pay interest thereon from that moment.

The legal representative of the Secretary who has been brought on the record is bound to pay the monies found to have come into his father's hands.

Second appeal against the decree of the court of the Temporary Subordinate Judge of Trichinopoly in A. S. No. 544 of 1914 preferred against the decree of the Court of the Additional District Munsif of Trichinopoly in O. S. No. 145 of 1914 (O. S. No. 389 of 1911 on the file of the Principal District Munsif's Court of Trichinopoly and O. S. No. 483 of 1912 on the file of the Principal District Munsif of Kulitalai).

K. S. Ganesa Aiyar with *K.V.L. Narasimham* for Appellant.

T. V. Muthukrishna Aiyar for Respondents.

The Court delivered the following

Judgment:—The plaintiff is the liquidator of a company incorporated under the Indian Company's Act: The third defendant whose legal representative has preferred this second appeal was the Secretary of the Company: Under the Articles of the Association he was entitled to be the Secretary until removed from office. The company was voluntarily wound up in January 1911;

* S. A. No. 1860 of 1915. 24th July, 1917.

Ganesa Seturam v. Ramaswami Servai.

on the 4th March of that year, the plaintiff was appointed liquidator. He made a demand on the 3rd defendant on the 12th August 1911 for the monies in his hands. (See Exhibit V).

The third defendant denied liability. Thereupon this suit was instituted. The 3rd defendant died during the course of the suit and the 8th defendant was brought in as his legal representative. The courts below have held and we think rightly, that the 8th defendant, the son is bound to pay the monies found to have come into his father's hands.

The only question on which we feel bound to differ from the courts below is as regards the award of interest. Mr. Ganesa Aiyar for the appellant contended that as there is no allegation of fraud in the plaint, the Subordinate Judge was wrong in treating the claim as one founded on misappropriation. If the right to interest was based on the ground of fraud there ought to have been a specific issue on the question. See *Johnson* v. *Rex* [1]. Further as was pointed out in *Turner* v. *Burkinshaw* [2], an agent by retaining the money due from him should not be held to have committed a fraud. Lord Chelmsford's observations in that case are in point. "It is the first duty of an agent—as Sir Thomas Plumer said in *Pearse* v. *Green* [3] quoting the words of the Lord Chancellor in *Lord Harwicke* v. *Vernon* [4]—to be constantly ready with his accounts. But this must mean that the agent must be ready to render his accounts when they are demanded. If no demand is made upon him, it is the simple cause of an agent retaining money which he thought to pay over, but which he has not been required to pay; and there is no case of which I am aware, where, under such circumstances, without anything more, the agent has been made to pay interest."

Mr. Muthukrishna Aiyar for the respondent realised the force of these observations and contended that the Secretary of a Fund is something more than an agent. We are unable to agree with him. There is no reason for regarding a Secretary as a trustee. It is true that the evidence in this case shows that he recovered the monies from the subscribers, and that he was also one of the Directors of the fund: but he is sued as Secretary and in our opinion he has no higher responsibilities than an agent.

The further contention of the learned Vakil for the respondent was that the Interest Act on which reliance was placed for

1. L. R. (1904) A. C. 817.
2. (1867) L. R. 2 Ch. App. 488.
3. (1819) 1 Jac and W. 135.
4. (1808) 14 Ves 504=33 E. R. 614.

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the appellant saves by the proviso claims to interest based on the law of the land. It may be conceded that if interest is payable otherwise, the Interest Act will not prevent its recovery, although there may be no written demand: S. 235 of the Company's Act VII of 1913 was quoted to show that in proceedings taken under the Act, the officers of the defunct fund are bound to pay interest. But the present suit is not, a proceeding of the nature contemplated by S. 235. Consequently the question is not affected by that special rule: we must therefore hold that the plaintiff is not entitled to interest up to the date when the liquidator made a demand. By his denial of liability however, in answer to the demand, the 3rd defendant must be deemed to have retained the money illegally. Until demand he ought to have been ready to pay up: After demand, if he kept back the money, it would amount to unlawful detention. As pointed out in *Turner* v. *Burkinshaw* [1], the liability to pay interest accrues from this moment. See also *The Collector of Ahmedabad* v. *Lavji Mulji* [2]. The decision in *Fakir Mahomed* v. *Rangiah Gounden* [3] to which the learned Vakil for the respondent drew our attention is consistent with liability being laid only after the intention becomes unlawful. Moreover in that case, the learned Chief Justice implied an user of the money which we do not find in the present case. The decision if interpreted as contended for would be opposed to *Kamuammdl* v. *Levvai Rowthen* [4] and *Subramania Aiyar* v. *Subramania Aiyar and others* [5].

In the result, we modify the decree of the Lower Appellate Court by directing that interest upon the principal sum decreed should run from the 12th of August 1911 and not from 1909. We see no reason to interfere with the rate of interest. On the amount decreed interest will be at 6 per cent. from the date of the decree till payment. Parties will pay and receive proportionate costs in this and in the Lower Appellate Court. The order of the 1st court as to costs will stand.

C. A. S.

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1. (1867) L. R. 2 Ch. A. 488. 2. (1911) I. L. R. 35 B 255.
3. (1913) 1 L. W. 181. 4. (1897) I. L. R. 20 M. 481=7 M. L. J. 263.
5. (1908) I L. R. 31 M. 250.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE KUMARASWAMI SASTRI.

Aiya Ramalinga Mudali and another ... *Appellants* (Defendants 1 and 2.)*

v.

Arumuga Mudali, minor by guardian Munusami Mudali. ... *Respondent (Plaintiff.)*

Ramalinga Mudali *v.* Arumuga Mudali.

Civil Procedure Code, O. 28 R. 1—Withdrawal of suit—Hindu Law—Widow—Suit by the nearest reversioner to challenge an alienation by the widow—Suit withdrawn—Right of the succeeding reversioner to challenge the alienation by suit, whether barred.

Where a Hindu daughter sued for a declaration that an alienation made by the widow was not binding on her and the suit is withdrawn without obtaining permission to institute another suit, the right of the succeeding reversioner (daughter's son) to challenge the alienation by another suit is not barred by reason of such withdrawal.

If a suit by one reversioner has been dismissed for default or withdrawn without ever being tried on the merits, a suit by another reversioner challenging the improper alienation is not barred. *Venkatanarayana Pillai* v. *Subbammal* [1] and *Janaki Ammal* v. *Narayanaswami Aiyar* [2] Expl.

Appeal against the order of the Court of the Subordinate Judge of North Arcot dated the 25th September 1916, in A. S. No. 148 of 1916 (A. S. No. 86 of 1916 on the file of the District Court of North Arcot) preferred against the decree of the Court of the District Munsif of Arni in O. S. No. 1030 of 1914.

S. Varadachariar for Appellant.

K. Bhashyam Aiyangar for Respondent.

The Court delivered the following

Judgment:—The question for decision before us in this appeal is whether the withdrawal of a suit instituted by the nearest reversioner a daughter without obtaining permission to institute another suit is binding on the succeeding reversioner the daughter's son so as to deprive him of the right to challenge the alienation by another suit. The learned pleader who appeared for the appellants has entirely relied on certain general language used by their Lordships of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal* [1] and also *Janaki Ammal* v. *Narayanaswami Aiyar* [2]. In the first case, their Lordships had to consider the question whether when the nearest reversioner who instituted the suit died, that suit could be continued by the next reversioner and

* A. A. O. No. 41 of 1917. 19th July, 1917.

1. (1915) I. L. R. 38 M. 406 at 410. 2. (1916) I. L. R. 39 M. 634.

Ramalinga Mudali v. Arumuga Mudali.

they held that it could be. In giving their reasons for the decision, they treated the next reversioner as legal representative for the purpose of reviving the action. It is contended that it logically follows that if a suit which is instituted by one reversioner is withdrawn or dismissed for default of prosecution, all the other reversioners will be barred and prevented from questioning the alienation by a separate suit. We do not think that thier Lordships of the Privy Council ever contemplated such a result when they held that when a reversioner who instituted a suit dies, that suit can be revived by another presumptive reversioner. The scope of the decision is to enable one reversioner whose interest is common with that of the reversioner who instituted the suit to carry on the same action for the protection of the estate. It would be a violent conclusion to draw from such a decision to say that if a suit instituted by one reversioner has been dismissed for default or without never being tried on the merits, a suit by another reversioner, challenging the improper alienation is barred. In the other case in *Janaki Ammal* v. *Narayanaswami Aiyar* [1] there is only some general observation to the same effect as in *Venkatanarayana Pillai* v. *Subbammal*, [2] and no other authority has been cited before us which covers the present case laying down that the dismissal for default or non-prosecution of a suit by one reversioner bars the institution of another suit by another presumptive reversioner.

The appeal is dismissed with costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE KUMARASWAMI SASTRI.

1. Rajah Papamma Rao Garu, being dead, M. R. Ry. Gopisetti Narayanasami Naidu Garu, Receiver Nidadavole and Medur estates ceased to exercise his functions as such and others.	...	*Appellants* (Claimant and party Appellant in the High Court).*
v.		
Revenue Divisional Officer, Guntur	...	*Respondent (Referring Officer).*

Papamma Rao Garu v. Revenue Divisional Officer Guntur.

Land Acquisition Act Ss. 12 (2), 45 (2) and (3) and 53—Notice of award by the Collector under S. 12 (2)—Whether service on the manager of the office of a receiver of an estate, proper service within the meaning of—Applicability of the provisions of the Civil Procedure Code to such notice.

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* A. S. No. 270 of 1916. 16th August 1917.

1. (1916) I. L. R. 39 M. 634.
2. (1915) I. L. R. 38 M. 406.

Papamma. Rao Garu v. Revenue Divisional Officer Guntur.

Notice of an award passed by the Collector under the Land Acquisition Act is not properly served on the manager of the office of the Receiver of an estate in the absence of the Receiver under S. 12 (2) of the Act read with S. 45 Sub-sections 2 and 3.

Quære :—Whether the provisions of the Civil Procedure Code apply to such notice by virtue of S. 53 of the Land Acquisition Act.

T. Prakasam for Appellant.

The Government Pleader for the Respondent.

The Court delivered the following

Judgment:—The question in this appeal is whether the notice under S. 12 (2) of the Land Acquisition Act was properly served on the Manager of the Office of the Receiver of Nidadavole and Medur Estates in the absence of the Receiver. S. 45 (2) of the Act provides that service is to be made whenever it may be practicable on the person named therein, and when such person cannot be found in the manner provided in sub-sec. (3). It is not suggested in the present case that service had been effected in conformity to S. 45.

If reliance is placed on S. 53 of the Act, that section merely provides " save in so far they may be inconsistent with anything contained in this Act. the provisions of the Code of Civil Procedure shall apply to all proceedings before the court under this Act. " It is open to question whether the provisions of the Code can be taken to apply to the notice in question by virtue of this section. Assuming that they can, we are of opinion that they have not been complied with. Order V. Rule 12 of the Civil Procedure Code provides for service in person unless the person to be served has an agent empowered to accept service. That was section 75 of the old Code. Order 3 rule 6 (1) which was section 41 of the old Code provides that, in addition to the recognised agents described in rule 2 of that Order which does not apply, any person residing within the jurisdiction of the Court may be appointed as agent to accept service of process but under the next sub-rule such appointment must be made by an instrument in writing signed by the principal. There is no such appointment in writing in the present case, and even assuming that the Manager had the Receiver's authority to accept service of notices or processes, still that would not, in our opinion, make this a good service. We must, therefore, allow the appeal and reverse the decree of the District Judge and remand the case for disposal according to law, with costs payable in three months.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS KT., CHIEF JUSTICE AND MR JUSTICE OLDFIELD.

Messrs. Huson and Robinson, the Secretaries for the Thodapuzha Rubber Company, Ltd. ... *Appellants*(Petitioners.)*

v.

The Registrar and Asst. Registrar of Joint Stock Companies, Madras. ... *Respondents (Respondents).*

Thodapuzha Rubber Co. Ltd. *v.* The Registrar Joint Stock Companies Madras.

Indian Companies Act, VII of 1913. *S.* 104 (1) (*b*)—*Allotment of share "as fully paid up otherwise than in cash"—Meaning.*

Where the question was whether an allotment by the Appellant Company of a fully paid up share to a debenture-holder in exchange for his debenture pursuant to a condition in the debenture was or was not an allotment of a share "as fully paid up otherwise than in cash" within the meaning of S. 104 (1)(b) of the Indian Companies Act, 1913 and it appeared that the debenture deed provided "The registered holder hereof shall while the same remains in force and upon giving previous notice in writing be entitled to surrender this debenture and receive in consideration thereof one fully paid ordinary share of Rs. 100 of the company part of or ranking *pari passu* with the ordinary shares of the original capital. Upon the surrender of this debenture under this condition the holder will not be entitled to proportionate interest thereon and the ordinary share so allotted in exchange shall rank for dividend from and after the half year in which the registration is made", *Held* that the share allotted in those circumstances was allotted 'as fully paid up otherwise than in cash" and therefore came within the provisions of S. 104 (1) (b) of the Act.

On appeal from the judgment of the Honourable Mr. Justice Coutts Trotter, dated the 21st day of December 1916 in the Ordinary Original Civil Jurisdiction of the High Court in the matter of the claim of Thodapuzha Rubber Company, Ltd., and of Messrs. Huson and Robinson, the Secretaries, to file a return of allotment of shares under clause I (a) of S. 104 of the Indian Companies Act, 1913.

D. Chamier instructed by *King and Patridge* for Appellant.

The Hon. The Adv-General instructed by *Henry Brightwell* for Respondent.

The Court delivered the following

Wallis. C. J.

Judgments:—*The Chief Justice*:—This is an appeal from a decision of Mr. Justice Coutts Trotter that an allotment by the appellant company of a fully paid up share to a debenture-holder in exchange for his debenture pursuant to a condition in the debenture is an allotment of a share "as fully paid up otherwise

* O. S. A No. 10 of 1917. 16th July 1917.

Thodapuzha Rubber Company Ltd. *v.* Joint Stock Company, Madras.

Wallis, C. J.

than in cash" within the meaning of S. 104 (1) (b) of the Indian Companies Act, 1913. The debenture-deed provides "The registered holder hereof shall, while the same remains in force and upon giving previous notice in writing, be entitled to surrender this debenture and receive in consideration thereof one fully paid ordinary share of Rs. 100 of the Company part of or ranking *pari passu* with the ordinary shares of the original capital. Upon the surrender of this debenture under this condition the holder will not be entitled to proportionate interest thereon and the ordinary share so allotted in exchange shall rank for dividend from and after the half year in which the registration is made." I agree entirely with the learned Judge in holding that the share allotted in these circumstances was allotted as fully paid up otherwise than in cash and therefore came within the provisions of S, 104 (1) (b) of the Act.

It has been argued before us that because the debenture-holder originally paid Rs. 100 in cash for his debenture the share in the company which was allotted to him some years afterwards should be regarded as paid up in cash. What the debenture-holder got for his Rs. 100 was a debenture and all the rights which a debenture-holder has, and he enjoyed those rights for a number of years and afterwards parted with those rights pursuant to the provision in the debenture-deed and acquired a share in consideration of his surrender of the debenture-deed; so that he acquired the share, as stated in the clause itself, in exchange for the debenture. Speaking for myself I fail altogether to see how that can be said to be a case in which the share was allotted to him as fully paid up in cash. It seems to me that it was allotted to him as expressly stated not for cash but in consideration of the surrender of his debenture and the rights which he held under it. There is admittedly no case in the books upon S. 25 of the English Companies Act 1867 or the more recent sections, which precisely covers this point. But I am glad to see that the same view is taken by Sir Francis Palmer with regard to a clause in the debenture which is practically in the same terms, in Part III of 11th Edition of his Company Precedents, Form 44 at page 297. I do not think it necessary to go through the cases which have been cited before us many of which are dealt with by the learned Judge in his judgment. The present case is clearly distinguishable

Thodapuzha Rubber Company Ltd. v. Joint Stock Company, Madras.

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from *Spargo's case* 1 where money was actually due by the Company to the person (the vendor to the Company) to whom the share was allotted. Here the debenture has not yet become payable to the allottee and therefore there is nothing which can be made the subject of a set-off. It is, I think, clear upon the authorities that in a case like this there must be a debt actually due and owing by the Company to make the doctrine of *Spargo's case* 1 applicable. It is also unnecessary to consider whether there must also be a debt immediately due and payable by the company to the allottee. In *Ferrao's case* 2 it was held that this is not necessary. It does, however, appear abundantly clear that to apply the doctrine there must be a debt immediately due and payable by the Company to the allottee. For these reasons, I think the appeal fails and must be dismissed with costs.

Oldfield, J:—I agree.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE SRINIVASA AIYANGAR.

Florina Marties ... *Appellant* (1st Defendant).*

v.

M. L. Pinto and another ... *Respondents (Plaintiff and 2nd Defendant).*

Florina Marties v. Pinto.

Assignment—Unregistered voluntary association—Fund subscribed by member-Bonus—Member's right to nominate benificiary in accordance with rules—Rights of nominee.

Lucia Fernandez was a member of the Roman Catholic Provident Fund, an unregistered voluntary association managed by a committee, having for its object the making of provision for the family of deceased members out of the funds of the society, in accordance with its rules. Lucia Fernandez was given a "policy" by which the society undertook to pay a certain sum called "bonus" to the person named in her latest nominee list and in the absence of such a person, to her legal heirs. According to the rules of the society, the policy was not assignable and a member could only nominate the wife or husband as the case may be, and children, unless the managing committee expressly permitted the nomination of any other person. The nomination list might be changed by a new nomination, but the change must be sanctioned by the committee before it became operative and in any case; the revoked nomination list of which the member retained a duplicate, must in all cases be surrendered to the fund and sent along with the new nominee list. The duplicate nomination list was looked upon as something like debenture. In 1904 Lucia Fernandez with the sanction of the committee nominated the first defendant and it was agreed between them that the bonus should belong to the latter and the policy and the duplicate of the nomination list were delivered to the first defendant. Thereafter the first defendant paid the subscription or calls due

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* S. A. No. 404 of 1915. 22nd March 1917.

1. (1873) L. R. 8 Ch. App. 407. 2. (1874) L. R. 9 Ch. App. 355.

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by Lucia Fernandez. In 1908 Lucia Fernandez attempted to revoke the nomination of the first defendant and substitute the plaintiff, her elder son as beneficiary. She was unable to return the previous nomination list and the committee after inquiry declined to sanction the new nomination. On 6—5—1910, a few days before her death, she purported to bequeath the bonus to plaintiff who obtained probate of the will and sued as representative of Lucia Fernandez for the bonus. The Fund deposited the money in Court.

Held, that the bonus belonged to the first defendant and that the plaintiff's suit was liable to be dismissed. If under the contract between the member and the society, the society undertakes to pay a particular person, that person is entitled to the money, though the member may have the power to select any person he chooses and though the nomination may be ambulatory in character so as to enable the member at his entire discretion to change the nomination or even to make the fund his own by merely observing the formalities prescribed by the rules. Further, the nomination paper signed by Lucia Fernandez might amount to an assignment of the bonus intended to operate as such.

Second appeal against the decree of the District Court of South Canara in A. S. No. 344 of 1914 preferred against the decree of the Court of the District Munsif of Mangalore in O. S. No. 171 of 1910.

B. Sitarama Rao for Appellant.

C. V. Ananthakrishna Aiyar for Respondents.

The Court delivered the following

Srinivasa Aiyangar, J.

Judgments :—*Srinivasa Aiyangar, J.* :—The question raised in this appeal is whether a sum of money paid into court by the 2nd defendant the Roman Catholic Provident Fund, Mangalore belongs to the plaintiff or the 1st defendant. The Roman Catholic Provident Fund is an unregistered voluntary association in the nature of a club managed by a committee. Its object is to make provision for the family of the deceased members out of the funds of the society in accordance with its rules which are subject to alteration. One Lucia Fernandez joined the society as a member and according to the rules of the society obtained what is called a 'policy' by which the society undertook to pay a certain sum called 'bonus' to the person named in her latest nominee list and in the absence of such a person to those who are declared to be legal heirs by evidence approved of by the directors. According to the rules of the society the policy was not assignable and a member can only nominate a member of his or her family—the family for this purpose is the wife or husband as the case may be and children—unless the managing committee expressly permits the nomination of any other person. The nomination list may be changed by a new nomination, but the change must be sanctioned by the committee before it becomes operative and in any case

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the revoked nomination list of which the member retains a duplicate must in all cases be surrendered to the Fund and sent along with the new nominee List. The duplicate nomination list is looked upon as something like a debenture. Lucia Fernandez first nominated her husband, and on his death in 1904 with the sanction of the Committee nominated the 1st defendant Florina Marties the wife of her younger son. The 1st defendant says that the nomination was really an assignment to her of the bonus in consideration of the sum of Rs. 300 due to her from Lucia Fernandez. Whether Rs. 300 was owing to her or not there can be no question that Lucia and the 1st defendant agreed that the bonus should belong to the latter, for the policy and the duplicate of the new nomination list were delivered to the 1st defendant; thereafter she paid the subscriptions or calls due by her mother-in-law. The mother-in-law as between herself and the 1st defendant ceased to have any interest in the bonus or any liability for the calls. In 1908 Lucia Fernandez apparently quarrelled with the 1st defendant and attempted to revoke the nomination and substitute the plaintiff her elder son as beneficiary. She was unable to return the previous nomination List and the Committee after enquiry declined to sanction the new nomination as they were entitled to do. She did nothing thereafter to get the Fund to accept the plaintiff as the nominee. But on the 6th May 1910 a few days before her death she purported to bequeath the bonus to the plaintiff. The plaintiff has also obtained probate of the will and is the representative of Lucia Fernandez. The question is to whom does the 'bonus' belong, the plaintiff or the 1st defendant.

There is now no question of who is entitled to bring an action against the Fund to recover the amount due on the policy, for the money has been paid into Court; the question is as to the beneficial ownership of the money. The first Court held that the policy amount was the property of the deceased Lucia Fernandez, that the nomination did not pass any interest whatsoever to the nominee and that the plaintiff as the legatee was entitled to it subject to the repayment of the subscriptions paid by the 1st defendant to keep up the policy, and the sum of Rs. 300 due to her as debt. On appeal, the District Judge held that the plaintiff as legatee was not entitled to the amount but that he became the latest nominee of Lucia Fernandez though his nomination was not accepted or sanctioned by the Fund. This is obviously wrong; for the nomination can be changed only in conformity with the rules and

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they seem to have been framed with a view to prevent a fraudulent or improper change of nomination by insisting on the production of the previous nomination list and requiring the sanction of the Committee. The object of the Fund requires that the members should not have an unrestricted right of disposal over the bonus and the rules therefore give only a limited power of appointment. It is not said that the Committee were actuated by any improper motives in declining to accept the nomination and Lucia Fernandez herself apparently gave up the idea of nominating the plaintiff under the rules. It has not been contended that the will itself operated as a nomination of the plaintiff. In fact the learned pleader for the respondent practically conceded that the plaintiff cannot claim as a nominee. He supported the view taken by the trial Judge viz., that the policy amount was the money of the testatrix and passed to her representative and contended that if the 1st defendant had any claim against the estate as a creditor or otherwise she must enforce it by other proceedings. He strongly relied on the decision of this court in *Oriental Government Security Life Assurance Co.* v. *Vanteddu Ammiraju* [1] and on *Shankar Vishvanath* v. *Umabai* [2] and *Ishani Dasi* v. *Gopal Chandra* [3] in Bombay and Calcutta. It appears to me that these cases do not touch the present question. Whatever may be the meaning of the words 'for the benefit of wife and children' in an ordinary Life Insurance Policy taken out by a person without any understanding or agreement with them,—he may even be unmarried,—in a case like this where the nominee by agreement with the nominator was entitled to the money, there can be no question that as between the estate of the nominator and the nominee the latter is entitled to it. The power of revocation and renomination which the member possesses under the rules which are incorporated in the contract between the member and the Fund, may enable the Fund to discharge its liability under the contract by paying to the latest nominee without concerning itself with the rights of other persons to the bonus against the member or her nominee. It may also be that if the nominee is not a party directly or indirectly to the contract between the member and the Fund, the only person who can enforce the contract is the legal personal representative of the deceased member, but on recovering the money the representative

1. (1911) I. L. R. 35 M. 162. 2. (1913) I. L. R. 37 B. 471.
3 (1914) 20 C. L. J. 44.

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must hold it for the benefit of the person who as against the estate of the deceased member is entitled to it. As said by Holmes, L. J., " There is no inconsistency between a right of action being under the complete control of a litigant and the fruits of the action being held by him for the benefit of a third party ". *Kenney* v. *Employers Liability Assurance Corporation* 1. In *Ashby* v. *Costin* 2, the rules of an unregistered Friendly Society provided for the payment of certain allowance to the relatives of a deceased member in such proportions as the Committee should determine unless the member bequeathed it by *will.* A member died leaving a sister, but without making a will. The society paid the death allowance to the sister, and the plaintiff the administrator of the deceased brought the action to recover the money from the sister on the ground that the stipulated allowance was a part of the assets of the deceased and the sister was not entitled to it. The action was dismissed, the Court holding that the money was not the money of the deceased, but could have become his only by his exercising the power given to him by the rules by making a will in which case it would become his assets. This decision was followed in *In re Davies : Davies* v. *Davies* 3 and cited with approval in *Bennet* v. *Slater* 4, these being cases of registered societies, registered under the Friendly Society's Acts. That I think makes no difference for the present purposes and in all these cases the principle adopted was that if under the contract between the member and the Society, the Society undertakes to pay a particular person, that person is entitled to the money, though the member may have the power to select any person he chooses and though the nomination may be ambulatory in character so as to enable the member at his entire discretion to change the nomination or even to make the Fund his own by merely observing the formalities prescribed by the rules. The present is a much stronger case, for in my opinion the nomination paper signed by Lucia amounts to an assignment of the bonus and was intended to operate as such. It is however unnecessary to go so far. The 1st defendant then is entitled to the whole of the bonus paid by the 2nd defendant. The plaintiff's suit must be dismissed with costs throughout and the money in court should be paid to the 1st defendant.

Abdur Rahim, J. :—I agree.

A. V. V.

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1. (1901) 1 Ir. Rep. 301, C. A.
2. (1888) 21 Q. B. D. 401.
3. (1892) 3 Ch. 63.
4. (1899) 1 Q. B. 45.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Appala Raja and others ... *Petitioners* (Respondents Nos. 1 to 3 in S. A. No. 1198 of 1913 on the file of the High Court.*

v.

Rangappa Naicker and others ... *Respondents (Appellants and the 4th respondent in do.)*

Appala Raja *v.* Rangappa Naicker.

C. P. Code, S. 110—Leave to appeal to His Majesty in Council—Dispute regarding irrigation rights—Valuation—Substantial question of law.

The subject-matter in dispute in the case was the right of the plaintiffs to use the water of a pond and a channel for the irrigation of their lands. It was contended for the applicant for leave to appeal to His Majesty in Council, that the application fulfilled the requirements of the three paragraphs of S. 110 of the C. P. Code.

Held that, though the suit, framed as one for a declaration and an injunction, had been valued for purposes of jurisdiction at Rs. 300, the real value of such a right could properly be ascertained only on the basis of the detriment or injury which the plaintiffs would suffer if that right were negatived. The extent of the injury having been found to be negligible so far as pecuniary value was concerned, the application did not fulfil the requirements of the first paragraph of S. 110 of the C. P. Code.

Per *Sadasiva Aiyar, J.* The word 'property' in the second paragraph of S. 110 means rights in property inferior to full ownership where such inferior rights alone are the subject-matter in dispute The suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards.

Per *Spencer, J.* The claim must be one "to or respecting property" of Rs. 10,000 in value, not a claim merely affecting property of such value.

Where the questions of law involved in a case had been settled by previous decisions of the Privy Council and where the High Court had merely to apply the law to the facts of the case, there could be no substantial point of law of general interest so as to justify the grant of leave to appeal to His Majesty in Council.

Petition presented under Or. 45 Rule 3 of the Code of Civil Procedure praying for the grant of a certificate enabling the Petitioners to appeal to His Majesty in Council against the decree of the Court in S. A. No. 1196 of 1913 preferred against the decree of the Court of the Temporary Subordinate Judge of Sivagnana in A. S. No. 891 of 1911 (O. S. No. 247 of 1909 on the file of the Court of the District Munsif of Srivilliputtur).

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* C. M. P. No. 2858 of 1916. 13th February 1917.

T. R. Venkatarama Sastriar and *M. S. Vaidyanatha Aiyar* for the Appellants.

V. Ramesam and *A. S. Visvanatha Aiyar* for the Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments :—*Sadasiva Aiyar, J.*:—This is an application by the plaintiffs (who were respondents before us in S. A. No. 1198 of 1914) for leave to appeal to the Privy Council against the judgment of this court which reversed the decision of the Subordinate Judge of Sivaganga and dismissed the plaintiffs' suit. The application for leave is based on the ground that the decree of this court relates to a subject-matter whose value was Rs. 10,000 or upwards in the Court of first instance and the subject-matter in dispute on appeal to His Majesty in Council is also of the same value and that therefore the application fulfils the requirements of the first paragraph of Sec. 110, Civil Procedure Code. It is further alleged that the decree involves directly or indirectly some claim or question to or respecting property of like amount or value and hence it further or in the alternative, satisfies the requirements of the second paragraph of Sec. 110, Civil Procedure Code. It is finally contended that even if neither of the above requirements is fulfilled, the application satisfies the conditions of paragraph 3 of Sec. 110, Civil Procedure Code, namely, that there is a substantial question of law involved in the suit on which it is advisable that there should be a pronouncement by their Lordships of the Privy Council.

It may be remarked that in the plaint, the subject-matter in dispute in the suit is valued at Rs. 300 for purposes of jurisdiction. The Court-fee paid on the plaint is Rs. 11-8-0 which would cover a subject-matter of a value of about one hundred and forty rupees only. No doubt, the value for the purpose of calculation of court-fees and the value fixed for the purpose of jurisdiction in respect of claims for declarations and injunctions do not afford in all cases the proper criteria for finding out the value of the subject-matter in dispute for purposes of ascertaining whether the requirements of the first paragraph of S. 110 are satisfied. Now the subject-matter in dispute, in this case is the right of the plaintiffs to have the water of the Thalaigidanga pond and of the channel B for the irrigation of their fields. The real value of that right can be properly ascertained only on the basis of the

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detriment or injury which the plaintiffs would suffer if that right is negatived as it has been. The affidavit in support of the application for leave mentions in paragraphs 14, 15 and 16 that the plaintiffs have suffered (either by the decreased value of the lands or by the decrease of the annual average income) an injury of which the pecuniary equivalent amounted to very much more than Rs. 10,000. But the finding of the District Munsif (to whom this question was referred by this Court for his opinion which we accept) is that the actual detriment or injury caused to the plaintiffs does not amount to Rs. 10,000 and is negligible so far as pecuniary value is concerned. It seems to me therefore that so far as the first paragraph of Sec. 110 is concerned, this case does not fulfil the requirements thereof.

Then Mr. Venkatarama Sastriar argued that the requirements of the second paragraph are fulfilled because though the subject-matter of the suit and the subject-matter in dispute on appeal to His Majesty in Council may be less than Rs. 10,000 in value, the decree of this Court involves a claim "respecting" irrigation of lands which lands are worth more than a lakh of rupees. If the word 'property' in the second paragraph of section 110 be given the widest meaning, and if the word 'respecting' is also given a very wide interpretation, the above argument has no doubt much force. But in construing the word 'property' in the second paragraph, we cannot lose sight of the first paragraph of section 110 to which the second is an alternative. I think 'property' in the second paragraph of section 110 means rights in property inferior to full ownership where such inferior rights alone are the subject-matter in dispute. Hence the second paragraph means that the suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards. I am fortified in this view by the decision of Sir Lawrence Jenkins, C. J., and Mr. Justice Russel in *De Silva* v. *De Silva* [1]. The case in *Ajnas Kooer* v. *Luteefa* [2] also lends support to this view as being the only reasonable view of the law on this point. No doubt, the provisions of the second paragraph of section 110 had not been enacted on the date of that decision but I think the second paragraph only intended to extend the privilege given by the first paragraph (in so far as it enabled an appeal to be filed even though the dispute directly involved in the litigation sought to be taken

1. (1907) 6 Bom. L. R 403 at p. 406. 2. (1872) 18 W. R. 21.

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up to the Privy Council was less than Rs. 10,000) only to cases where a claim regarding rights of Rs. 10,000 or upwards in value is involved *indirectly*, though not directly. Whether directly or indirectly involved, on the question however, as to what is the thing which should be Rs. 10,000 or upwards in value so as to justify an appeal to the Privy Council, I think that the case in *Ajnas Kooer* v. *Luteefa* [1] furnishes an authority which is entitled to great respect.

Coming to the third paragraph of section 110, I have considered in *Raghunatha Thathachariar* v. *Thiruvengadachariar* [2], the question as to what should be the nature of the substantial point of law of general interest involved which would justify a certificate being granted under Or. 45, R. 3, last clause of sub-section 1 read with Sec. 109, clause (c) and the last paragraph of Sec. 110. In this case, the only questions of law really involved seem to come under a few heads, one of them being whether Oldfield, J., and myself were right in stating in our first judgment in this case that no plea of lost grant was put forward by the plaintiffs. The other questions as to the extent of the right of the Government to regulate the flow of water for irrigation and as to whether the plaintiffs are entitled to a prescriptive right by sufficiently long enjoyment are questions which (so far as they involve questions of law) have been considered in several cases both by the Privy Council and by this High Court and I do not think that any new question is involved in this case which makes it desirable to have a fresh pronouncement from their Lordships of the Privy Council.

Mr. Venkatarama Sastriar argued that the persistence and keen fighting spirit displayed by both his clients and their opponents in this litigation show that large substantial interests are really involved in the suit, substantial both as regards the pecuniary value of the interests and the legal questions of general importance involved. I am not, however, satisfied that the persistence and keenness may not be due more to sentimental considerations and to the not uncommon spirit of factious rivalry between landholders of neighbouring villages. I would therefore refuse this application and dismiss it with costs.

Spencer J.

Spencer, J. :—On the first point it is clear that the subject-matter in dispute in this case is not of the value of Rs. 10,000 or

1. (1872) 18 W. R. 21.

2. (1915) 2 L. W. 992.

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upwards. It was found by both the lower courts, whose decisions of fact are binding on this court in second appeal, that no material diminution of water-supply to which the plaintiffs were entitled, had been caused by the defendants' acts, and that no damage had been caused thereby to the plaintiffs' lands. I think that the extent to which the property would be deteriorated in value by the decision of this court remaining unreversed is the proper criterion by which the value of the subject-matter of this suit should be tested (see *Ajnas Kooer* v. *Luteefa* [1]).

Mr. Venkatarama Sastriar, however, argues on the second point that the case falls within the words of the second part of S. 110 of the Code of Civil Procedure and that the "decree or final order involves directly or indirectly some claim or question to or respecting property of like amount or value." In *De Silva* v. *De Silva* [2], an extreme case was suggested of a suit for a share of the value of Rs. 100 in an estate of the value of Rs. 10,000 being taken to the Privy Council. It was considered by the court that if such an interpretation were placed upon the section, it would defeat the object of the section which is to prevent small claims from going to the Privy Council. I consider that it was not intended by the legislature that claims of trifling value should be taken up to the Privy Council unless the property directly or indirectly involved in the result of the litigation is of Rs. 10,000 in value or upwards, and unless some substantial question relating to the right, title and interest in such property is directly or indirectly decided thereby. I do not think it can have been intended that when some subsidiary interest, such as an easement of inconsiderable value attached to property of great value, is in dispute, the value of the property affected rather than the value of the subject-matter of the suit should determine the right of appeal. The claim must be one "to or respecting property" of Rs. 10,000 in value, not a claim merely affecting property of such value.

Thirdly, I am not satisfied that any question of law of general interest or importance is involved in this case. What the Judges had to consider was rather the application of the law to the particular facts of the case that was before them. I therefore agree in refusing the leave to appeal.

A. V. V.

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1. (1872) 18 W. R. 21.
2. (1907) 6 Bom. L. R. 403.

PRIVY COUNCIL.

PRESENT:— LORD DUNEDIN, LORD SHAW, LORD SUMNER, SIR JOHN EDGE AND MR. AMEER ALI.

[On Appeal from the Chief Court of Punjab.]

Brij Indar Singh ... *Plaintiff * Appellant.*

v.

Lala Kanshi Ram and others ... *(Defendants Respondents.*

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Brij Indar Singh *v.* Lala Kanshi Ram.

Limitation—"Sufficient cause" for not presenting an appeal within the period prescribed—Whether time spent in applying for review may be excluded in computing the period—Mistake of law—Whether it may amount to sufficient cause —Indian Limitation Act (Act 9 of 1908) Ss —5, 14.—Judicial discretion—Duty of Superior Court when it is questioned—Abatement of suits—Should not be pronounced exparte-procedure in questioning abatement—Whether review or appeal is the proper remedy—Code of Civil Procedure (Act 14 *of* 1882) *Ss.* 365, 366, 368, 371, 588—*Substitution of parties in miscellaneous appeal—Sufficient for all stages of a suit.*

All that S. 5 of the Limitation Act requires in express terms as a condition for the exercise of the discretionary power of admitting an appeal presented after time is sufficient cause for not presenting it within time. The true guide for a Court is whether the appellant has acted within reasonable diligence in prosecuting his appeal and if he has been delayed by prosecuting other civil proceedings, e. g., a review, whether such proceedings were reasonably prosecuted and in good faith.

A mere mistake in law is not *per se* sufficient reason for asking the Court to exercise its discretion under S. 5, but when it has in fact occasioned erroneous proceedings it may be the foundation of an application for the indulgence which may be granted under S. 5.

These rules having been laid down by Full Benches in all the Courts of India and acted on for years, the Privy Council will not interfere with them, whatever the law in England and whatever they might have been disposed to do if the matter were open.

Ramjiwan Mull v. *Chand Mal* [1] overruled. *Brij Mohan Das* v. *Mannu Bibi* [2], *Kam Baksh* v. *Daulat Ram* [3], *Brojendra* v. *Coomar Roy* [4], approved.

If a Judge purporting to exercise discretion does so under the view that there is no general rule, when in fact there is one he misdirects himself, and the Superior Court must either remit the case or exercise the discretion themselves.

An order abating a suit is tantamount to a judgment in favour of defendant and should not be pronounced *ex-parte* without notice to the opposite side.

S. 371 of the Code of Civil Procedure, 1882, which gives a remedy by review against an abatement order, is available to a plaintiff whether such order is passed under S. 366 or S. 368. The appeal allowed by S. 588 is intended for other matters than abatement.

When a suit in a District Court was delayed pending disposal by the Chief Court of an appeal against an interlocutory order passed in such suit, and substitution of parties was effected only in the Chief Court in such appeal and not in the District Court.

16th June, 1917.

1. (1888) I. L R 10 All 587.
2. (1897) 19 All, 348. (F. B.)
3. (1881) P. R. p. 478. (F. B.)
4. (1867) 7 W. R. 529. (F. B.)

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Held, that the introduction of a plaintiff or defendant for one stage of a suit is an introduction for all stages, and that it was unnecessary to apply to substitute parties in the District Court.

Appeal from an order of the Chief Court of the Punjab dated January 20, 1911, confirming an order of the District Judge of Ferozepur.

The facts of the case are sufficiently stated in their Lordships' judgment and in the passage from Mr. Justice Johnstone's judgment of April 6, 1909 therein cited.

De Gruyther, K. C., and *O'Gorman* for Appellant.

Zeffertt for the Respondent A. A. Coates (one of the representatives of G. H. Coates deceased.)

De Gruyther, K. C., for Appellant :—The Chief Court erred in setting aside the order of the District Judge Prenter, whereby he set aside the abatement order passed by District Judge Sanford. The new District Judge had power in any case to pass that order under S. 371 of the Civil Procedure Code, but apart from that section the present appellant had the right to apply to him, as his predecessor's order was ex-parte.

Suria Bhatta v. *Sitaram Bhatta* [1] does not decide the point for which it is cited by the Chief Court, *viz.*, that S. 371 does not apply to abatement on the death of a defendant: the remark of Turner, C. J. to that effect is a mere *obitur dictum.* The other case cited by the Chief Court, viz. *Sham Singh* v. *Sant Singh*, [2] merely approves the Madras case,

But assuming that the Chief Court's judgment setting aside District Judge Prenter's order was correct and by appealing against District Judge Sanford's order appellant acquiesced in that judgment—I contend that our appeal was within time. The Punjab Code (Act 16 of 1884), S. 42 provides that an appeal to the Chief Court should be made within 90 days. I claim that Ss. 12 and 14 of the Indian Limitation Act to exclude the period from 24th April 1908 to 6th April 1909, being the time during which we were prosecuting with due diligence another civil proceeding. It was only on the 6th April, 1909 that we learnt through the Chief Court decision that we were wrong in proceeding by way of review. It is expressly laid down by S. 14 that time spent in making other proceedings is to be excluded in computing the period for making application: and I submit that the same principle applies by

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1. (1888) I. L. R. 7 M. 195. 2. (1885) 22 P. R. p. 41.

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analogy to appeals, so as to constitute "sufficient cause" under S. 5. *Balwant Singh* v. *Gumani Ram* [1].

(*Lord Sumner* :—You want to show, that Johnstone, J., made a mistake in law in exercising his discretion refusing you grace; where is the error in law?)

The learned Judge followed the decision in *Ramjiwan Mal* v. *Chand Mal* [2] where it was laid down that mistake of law could not constitute "sufficient cause" within S. 5. That case was overruled in *Brij Mohan Das* v. *Mannu Bibi* [3].

To the same effect is 183 P. R. 1888, which being a Full Bench decision of his own Chief Court was binding on the learned Judge.

(*Lord Dunedin* :—The real point is, ought not the Appellate Court to think it a reasonable and proper proceeding to make an application when the Judge to whom it was presented thought so?)

The principle for which I contend has long been approved in Calcutta.

Nabo Kasim Singh v. *Kamini Dossee* [4] (Miscellaneous Appeals) a decision of 14 Judges. *Brajendra Coomar Roy Chowdhry's case* [5].

Zeffertt for respondent A. A. Coates: The appeal to this Board is incompetent. When a decree of the High Court affirms the decree appealed against, the Board will not hear an appeal even though admitted, unless some substantial question of law is involved: *Karuppannan Servai* v. *Srinivasan Chetti* [6]. There is no such question of law here.

(*Lord Dunedin* :—The question of law in this case is whether *Ramjiwan Mal* v. *Chand Mal* [2] was right or wrong?)

I submit that the question whether the Court used its discretion or not can only be a question of fact.

The certificate here was granted under S. 109 (c) of the new Code of Civil Procedure, and being under the last clause of S. 110 the appeal must involve some substantial question of law.

(*De Gruyther*) referred to Order 45 rule 3 "or that it is otherwise fit for appeal."

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1. (1883) I. L. R. 5 A. 591.
2. (1888) I. L. R. 10 A. 57.
3. (1897) I. L. R. 19 A. 348 (F. B.)
4. (1865) 2 W R 35.
5. (1867) 7 W.R. 529.
6. (1901) L. R. 29 I. A. 38.

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The words of S. 109 are "as hereinafter provided" this must refer to S. 110. In any case a substantial question of law is requisite because the order appealed from affirmed the decision of the Court immediately below. S. 110. It is unnecessary that such order should affirm such decision on the merits. (*Beni Rai* v. *Ram Lakham Rai* [1].)

Secondly, I submit that S. 5 gives a discretion to the Judge and that this Court will not override that discretion unless arbitrarily used. It is not enough that this Court might have used its discretion otherwise. *Sharpe* v. *Wakefield* [2]. It is necessary for appellant to show that the Lower Court used its discretion capriciously or arbitrarily. *Bhimrao* v. *Ayyappa* [3]. It is impossible to contend this was the case here, when it is quite clear the Judge exercised his discretion judicially and that he carefully considered 183 P. R. 1888 and held that it did not bind him in this case.

Thirdly, I contend the Judge exercised his discretion rightly. A mistake of law on the part of solicitor, counsel or litigant is not "sufficient cause" for extending the period of appeal. *In re Helsby* [4] and *Coles* v. *Ravenshaw* [5]. There can be no such thing as *bona fide* mistake of law. *Bechi* v. *Ahsan-Ullah Khan* [6].

(Lord Dunedin:—pointed out that the presiding Judge in the latter case was also the presiding Judge in *Brij Mohan Das* v. *Mannu Bibi* [7].)

I quote it to show that though their mistake may have been honest they cannot have acted with due care and caution.

(Lord Dunedin :—Logically that would imply that no mistake of law could ever come under S. 14. In the two Full Bench cases in the Weekly Reporter the mistake must be a mistake of law, and the Judges laid down that if it were made with due care and attention, indulgence might be granted. How can you say it was not so made here when the Judge Prenter agreed with appellants' view and when the case comes here on appeal, I

1. (1898) 20 All 367.
2. (1888) 21 Q. B. D. 66 (80).
3. (1906) 31 Bom. 33, (36, 37).
4. (1894) 1 Q. B. D. 742 (C. A.)
5. (1907) 1 K. B. 1.
6. (1890) I. L. R. 12 All. 461.
7. (1898) I. L. R. 19 A. 348.

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myself think Prenter was right and Johnstone wrong? The poor man had Prenter's decision in his favour, and could not know Johnstone would say it was wrong: then he is blamed for "persisting" in his view.

(*Lord Sumner*:—In England there is a good deal of authority that a mistake of counsel is no ground for indulgence, but in India there seems to be strong authority for the opposite view. It is a big thing for us to upset a course of decisions.)

(*Lord Dunedin*:—These cases against you are Full Bench judgments, and they seem to cover nearly the whole of India. We are averse to altering settled rules of procedure).

(*De Gruyther*:—The Calcutta rulings have been adopted in Madras and Bombay).

Further, I submit that in fact appellant did not go to any Court at all to have the abatement under S. 368 set aside. His application to District Judge Prenter was in terms an application under Ss. 365 and 371, Civil Procedure Code. It was the learned Judge himself who took action under S. 368 as well. The plaintiff appellant has never up to date made the application required by that section, specifying the name, description, and place of abode of the legal representative of the deceased defendants. Without such application District Judge Prenter's order, so far as defendants were concerned was without jurisdiction.

(*Lord Sumner*:—If the Judge forced the remedy upon him, what do you suggest he should have done?)

[*Lord Dunedin*:—The plaintiff seems to have had an erroneous view that because he had only been put on the record in the Chief Court he needed to have it done again in the District Court. It seems to me he need not have applied at all.)

The Order of the Chief Court dismissing the appeal as time-barred can be supported on other grounds. No appeal against the order of abatement lies. That order was passed in March 1908, but the appeal was lodged on April 1909. The new Code of Civil Procedure came into force on January 1, 1909. Under the old Code there was a right of appeal from S. 368 under S. 588 (18) but the new Code gives no such right. The provision corresponding to S. 368 is Order 22 Rule 4: and Order 22 Rule 9 applies to non-joinder of defendants a procedure corresponding to the old S. 371. No doubt S. 154 of the new Code safeguards any present

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right of appeal which had accrued on January 1, 1909: but S. 154 does not apply here, as the right of appeal was barred by limitation at the commencement of the new Code.

De Gruyther, K. C.,—In reply: The order against us was made on April 6, 1909, after the new Code had come into force. Till then the order in our favour, setting aside the abatement, stood. The argument that no appeal lies under the new Code fails (1) because no order was ever made under Order 22 Rule 4. and secondly, if there were, Order 43 (k) provides an appeal.

My right of appeal is preserved by S. 154 of the New Code: it is a right which had accrued before that Act came into force.

Their Lordships' judgment was delivered (July 19, 1917) by

Lord Dunedin.

Lord Dunedin.—The facts out of which this case arises are very clearly and succinctly stated by Mr. Justice Johnstone in his judgment of the 6th April, 1909, which is part of the necessary history of the judgment actually before their Lordships. He says:—

"The history of this case is in brief as follows: In 1903 His Highness Raja Balbir Singh of Faridkot brought a suit under S. 283 Civil Procedure Code (1882) against Kashi Ram and Joti Mal, decree-holders, Mr. G. H. Coates, judgment-debtor, and two others, for a declaration that certain property, attached under Kashi Ram and Joti Mal's decree, was plaintiff's property, and so not liable. Great delay took place and an application for transfer of the case was made to the Chief Court; but a new District Judge having been ordered to Ferozepur, transfer became unnecessary. Again plaintiff applied for transfer of the case, and again the petition was rejected, and the case was taken up thereafter on the 21st April, 1904. In the course of the hearing on the 16th July, 1904, an application was made to the Chief Court to revise an order of the District Judge, directing a party to produce certain books. I need not go into details concerning this. Suffice it to say that the petition remained in the Chief Court till the 1st January, 1908, when Mr. Herbert, pleader for plaintiff, withdrew it, and that in the meantime certain casualties had occurred among the parties. In February 1906 Raja Balbir Singh died and was succeeded by the present Chief. On the 9th May, 1906, the latter applied in Chief Court for substitution of his own name and this was ordered on the 19th May, 1906. Joti Mal,

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defendant 2, had also died on the 15th April, 1906, and plaintiff said he heard of this (plaintiff is a minor) on the 8th November of the same year. Application for substitution of his five sons was made on the 13th December, 1907, and the file still being in the Chief Court, on the 11th January, 1908, the prayer was granted. These orders of the 19th May, 1906, and the 11th January, 1908; were apparently both *ex parte*.

"The papers went back from Chief Court to District Judge on the 13th March, 1908, and then an application was made to District Judge on the 16th March, 1908, by Kashi Ram, defendant 1, and Lala Achhru Ram, one of the sons of Joti Mal; praying for an order of abatement on the grounds that in none of the following cases had representatives of deceased parties been put on the record within time, *viz.*:—

"1. Vice Raja Balbir Singh, died February 1905;

"2. Vice Joti Mal, died April 1906; and

"3. Vice Mr. G. H Coates, died about December 1903.

"The new District Judge, Captain Sanford, without enquiry and without notice to plaintiff, the present Chief, and obviously without looking at the Chief Court's orders of the 19th May, 1906, and 11th January, 1908, summarily there and then ordered abatement, and gave applicants costs out of the deceased Raja's estates. The order was passed under both section 366 and section 368, Civil Procedure Code (1882), all three grounds set forth in the petition being accepted as sound.

"Upon a petition by the present Chief, Captain Sanford's successor, on the 8th April, 1908, reconsidered the *ex parte* order of the 16th Mach, 1908, and set aside the order of abatement in so far as it depended upon the matter of the decease of the late Raja. This was an order under S. 371, Civil Procedure Code, and was within the power of the District Judge. Then, on the 24th April, the District Judge took up the other two demises and set aside the abatement order also in respect of them. On both occasions it was urged before the District Judge that S. 371 did not authorise the reconsideration by him of an order under S. 368, Civil Procedure Code, but he overruled the objection."

Having thus set forth the facts, the learned Judge expressed his opinion that though S. 371 authorised the setting aside of the abatement in so far as it depended on a failure to substitute a new plaintiff under S. 366, it did not do so, in so far as the

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abatement order depended on a failure to substitute a new defendant under S. 368. Accordingly holding the District Judge Prenter's order to review to be *ultra vires*, he quashed that order and restored the *ex parte* order of the District Judge Sanford which abated the suit.

It follows from what Mr. Justice Johnstone had said, that in his opinion the proper course for the plaintiff who, by an *ex parte* order in the District Court, had had his suit brought to an end, was to appeal to the Chief Court against that order. This the plaintiff did. But on presenting his appeal he was met by the objection that it was time-barred. The case depended before the same Judge, Mr. Justice Johnstone. He upheld the objection. The case was then set down for review by the Chief Court. In that Court Mr. Justice Johnstone sat as sole judge. He, after a careful reconsideration, not unnaturally repeated his former judgment, but gave leave to appeal to His Majesty in Council.

The sole question directly raised is whether the time which was spent in getting the District Judge Prenter's judgment, which was afterwards decided to be wrong and in getting it set aside, falls to be deducted in calculating the time during which appeal was possible. This depends on S. 5 of the Limitation Act, which is in these terms:—

"Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had some sufficient cause for not presenting the appeal or making the application within such period."

It is right, also, to quote S. 14 of the same Act, which is as follows :—

"In computing the period of limitation prescribed for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of First Instance or a Court of Appeal, against the defendant, shall be excluded, when the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature is unable to entertain it."

This, it will be observed, does not in terms apply, as it deals with suits and not with appeals, but its relevance will be seen by the judgments afterwards quoted.

The learned Judge, Mr. Justice Johnstone, in his first deliverance on this matter, cited the case of *Ramjiwan Mal* v. *Chand Mal* [1]. That case laid down the broad proposition that a mistake in law never could be the foundation for an application for the

1. (1888) I. L. R. 10 All. 587.

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indulgence which may be granted under S. 5. If that were sound there would be an end of the case. Upon the assumption that review was not the proper remedy for an abatement granted in respect of S. 368 (which assumption the plaintiff by acquiescing in Mr. Justice Johnstone's judgment of the 6th April, 1909, must be held to concede), the proceeding by way of review instead of by appeal was a mistake in law. But the learned Judge's attention does not seem to have been called to the fact that the case cited was really reversed by the decision of *Brij Mohan Das* v. *Mannu Bibi* [1] where a full Bench held that a mistake in law may be the foundation for the relief craved. The case on its facts is not directly in point here, for it was concerned with a suit and not with an appeal; *i. e.*, was directly under S. 14; and further, the mistake made was clearly within the words "a Court which from defect of jurisdiction is unable to entertain it." In the second judgment the learned Judge carefully reconsidered the authorities. The case of *Karm Bakhsh* v *Daulat Ram* [2] had been specially pressed upon his attention; a Full Bench decision of his own Court which, if applicable, he was bound to follow. He refused to consider it applicable, because, in his opinion, it laid down no general rule, and each case he considered depended on its own facts.

Their Lordships find it impossible to agree with the view that the case of *Karm Bakhsh* v. *Daulat Ram* [2], laid down no general rule. The case was first taken in Chambers, when Plowden, J., the point being raised, said, "This class of cases is constantly cropping up, and some definite rule should be laid down." Following this view, when with another Judge he took up the case in the Divisional Court, he referred the matter to a Full Bench. The case was heard before a Full Bench, and Plowden, J. delivered the judgment. It will be enough to cite two passages from that judgment. After setting forth the terms of S. 5 of the Limitation Act, he says :—

"All that the section requires in express terms as a condition for the exercise of the discretionary power of admission of an appeal presented after time is sufficient cause for not presenting the appeal within the prescribed period. If such can be shown the Court may, in its discretion, which is of course a judicial and not an arbitrary discretion, admit the appeal. We think the true guide for a Court in the exercise of this discretion is whether the appellant has acted with reasonable diligence in prosecuting his appeal, and we think further that he ought ordinarily to be deemed to have acted with ordinary diligence, when the whole

1 (1897) I. L. R. 19 All. 348. 2 (1888) P. R. 473.

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period between the date of the decree appealed against and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal."

And again—

"We also agree with the High Court of Allahabad in the case reported in *Balwant Singh* v. *Gumani Ram* [1] that the circumstances contemplated in S. 14 of the Limitation Act should ordinarily constitute a sufficient cause within the meaning of S. 5."

These citations seem to show that there is a general rule expressed, and that the case was only sent to a Full Bench in order that some general rule should be laid down.

The learned Judge says that each case depends on its own circumstances. This is true. But he seems to treat this truism as if it was destructive of the idea that there can be a general rule. There is no inconsistency in the position. There may be a general rule as to the exercise of discretion, but each case must, nevertheless, be examined as to its own circumstances to see whether they make it fall within or without the terms of the general rule.

It would doubtless be within the power of this Board to hold that the general rule so laid down was wrong. But here it must be noticed that though as authority binding on Mr. Justice Johnstone it rests on the Punjab case, the authority for it is really much wider. The case of *Brojender* v. *Coomar Roy* [2] was also a Full Bench case, sent to the Full Bench of Calcutta in order to obtain a general rule, and it is well summarised in the head note which runs :—

"If a party presents an application for review of judgment within the ordinary period limited for appealing, the time occupied by the Court in disposing of such application will not be reckoned among the days limited for appealing, but will be added thereto, and memorandum of appeal presented within such extended period will be received as presented within time."

And in delivering judgment Peacock, C. J., mentioned that they were upholding the ruling of fourteen Judges in 1865, and that the practice upheld had been the practice of Madras since 1860. Their Lordships were also informed that the same rule had been followed in Bombay. In Allahabad the same result is reached by combining the case reported in *Balwant Singh* v. *Gumani Ram* [1] with the case in *Brij Mohan Das* v. *Mannu Bibi* [3].

Now if the matter were entirely open inasmuch as mere mistake in law is not *per se* sufficient reason for asking the Court

1. (1883) I. L. R., 5 All. 591. 2. 7 Suth. W.R. 529.
3. (1897) I. L. R., 19 All. 248.

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to exercise its discretion under S. 5 (instances of which are given in some of the cases cited by the learned Judge), there would be a good deal to be said in argument in favour of making the rule universal, and upholding in its entirety the ruling given in the case of *Ramjiwan Mal* v. *Chand Mal* [1] above cited. But the matter is not open. To interfere with a rule, which after all is only a rule of procedure, which has been laid down as a general rule by Full Benches in all the Courts of India, and acted on for many years, would cause great inconvenience, and their Lordships do not propose so to interfere.

It was strenuously urged by the learned counsel for the respondents that inasmuch as the power in S. 5 is admittedly a discretionary power, this Board ought not to interfere with the discretion exercised by Mr. Justice Johnstone, and he cited cases of which *Sharp* v. *Wakefield* [2] may be taken as a type. In reality however, that case is against him. For it laid down that discretion there as here must be a judicial and not an arbitrary discretion. Now if the Judge who purports to exercise the discretion does so under the view that there is no general rule, when in fact there is one, if he has, to use an expression often used in another class of cases, misdirected himself as to the law to be applied to the case, he cannot exercise a judicial discretion, and the Superior Court—in this case this Board—must either remit the case or exercise the discretion themselves. In a case like *Sharp* v. *Wakefield* [2] there would necessarily be a remit. Here it is otherwise, for the general rule applies, and it only remains to see whether the proceedings in the review were reasonably prosecuted and in good faith. That they were so their Lordships have no doubt. The District Judge Sanford made the order for abatement on the 16th March, 1908. The plaintiff applied on the 20th March to set it aside, and it was set aside by the District Judge Prenter on the 24th April, 1908. Mr. Justice Johnstone speaks of the plaintiff "persisting" in prosecuting review after the defendants had taken the point that appeal and not review was the proper remedy. But the defendants were held by the District Judge Prenter to be wrong, and their Lordships think that the plaintiff cannot be held in any fair sense to have "persisted" in his attitude till Mr. Justice Johnstone's first judgment of the 6th April, 1909. Accepting that judgment, he appealed on the 21st April,

1. (1888) I. L. R. 10 All. 587. 2. (1891) L. R. A. C. 173.

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1909. The question of what he did in the fifteen days is neither here nor there. For, accepting the general rule as stated above, the period for appealing being ninety days, the dates stand thus: the District Judge Sanford's order was made on the 16th March, 1908. That order was set aside on the 18th April, 1908. Thus only twenty-three days out of the ninety had expired. That left forty-seven days. And after the proceedings for review terminated only fifteen days were consumed before the appeal was presented.

Though it is not in the appellant's mouth to say that Mr. Justice Johnstone's first judgment, settling that review was incompetent, is wrong, he having acquiesced therein, still as the matter has been mooted and discussed, their Lordships think it better to say that in their view the District Judge Prenter's judgment on this point was right, and that of Mr. Justice Johnstone wrong. The point seems to their Lordships very clear. S. 365 provides for the substitution of a new plaintiff when the plaintiff has died, upon the application of the representative of the deceased plaintiff. S. 366 deals with the state of circumstances when no such application is made within a certain time. The defendant may either (1) have the suit abated; or (2) get an order putting up a new plaintiff. S. 368 deals in a similar manner with the case of the death of a defendant. Thus it will be noticed that abatement is a penalty which is only imposed on a failure of the plaintiff.

Then comes S. 371. This primarily deals with what abatement involves: "No fresh suit shall be brought on the same cause of action." It is obvious that it is only a plaintiff that is hurt by this. Nothing could be better for a defendant. It is also obvious that an abatement is equally hurtful to the plaintiff whether granted in respect of a failure under S. 366 or S. 368. When S. 371 goes on to say under what conditions the plaintiff can get rid of the abatement, it would be expected that it would deal with abatement however procured. And the opening words make it clear that it is so; "When a suit abates or is dismissed *under this chapter*." This chapter includes S. 368 just as much as S. 366. The learned Judge seems to think that an argument can be founded on the fact that in the appeal section 588, an appeal is given against orders pronounced under S. 368 and the second paragraph of S. 366, but none against those under the first paragraph of S. 366. The reason is apparent. S. 371

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which gave review was sufficient as to abatement so far as the plaintiff was concerned; but being a plaintiff's section only, it was unavailable to a defendant and as already pointed out, a defendant as such never would want to complain of abatement. But in paragraph 2 of S. 366 and in parts of S. 368, there are other matters than abatement. Under S. 366, paragraph 2 a defendant might bring about the introduction of a wrong plaintiff against the will of the right one; under S. 368 a plaintiff might introduce a wrong defendant. To the persons so aggrieved there is given appeal.

Though they think that Mr. Justice Johnstone's judgment on this point is erroneous, there is one remark which he makes in his opinion with which their Lordships agree, and which they wish to approve and emphasise. He points out how the whole mischief has arisen from the fact that the District Judge Sanford's order abating the suit was pronounced *ex parte* without giving the opposite party the opportunity of appearing. An order abating the suit, looking to the terms of S. 371 already quoted, may be said to be really tantamount to a judgment in favour of the defendant. To pronounce such a judgment *ex parte*, when no notice has been given to the opposite side to appear and contest the order, is much the same as to decide a suit against a defendant who has not been cited to appear. The practice, if it is a practice, is quite indefensible.

Their Lordships think it better to say further, that if the defendant had been present, it is clear that no order of abatement ought to have been pronounced. The plaintiff as representative of the original plaintiff, and the defendant's representatives of Joti Lal, had been introduced in the Chief Court. No doubt that was only done in the course of an interlocutory application as to the production of books. But the introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages, and the prayer, which seems to have been made *ob majorem cautelam*, by the plaintiff, in his application to the District Judge Prenter, under S. 365, was superfluous and of no effect. Coates, the judgment debtor, was only formally called, and the non-presence of his representatives would afford no ground for the abatement of the suit.

Their Lordships will therefore humbly advise His Majesty to allow this appeal, and to remit to the Chief Court to allow the

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appeal and to set aside the order of the District Judge Sanford, and to remit to the District Judge to proceed with the hearing of the case on the merits. The respondents will pay the appellant the costs of this appeal and in the Courts below the costs so far as the proceedings were directed to setting aside the order of Judge Sanford. The general costs of the suit will abide the result on the merits.

Solicitors for Appellant:—*T. L. Wilson & Co.*

Solicitors for Respondents:—*Lumley and Lumley.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE SPENCER AND MR. JUSTICE SRINIVASA AIYANGAR.

Arunachalam Chetty ... *Appellant* (Plaintiff)*

v.

Sabapathy Chetty ... *Respondent (Defendant).*

Arunachalam Chetty v Sabapathy Chetty.

Decree obtained by fraud—Suit to set aside—Jurisdiction of inferior Court to entertain suit—Test—Nature of reliefs which inferior Court can grant—Revival of suit in which decree was passed—Application for, to be made to which Court—Superior Court if has concurrent jurisdiction to entertain suit—Consent decree obtained by fraud—Remedy of aggrieved party—Suit or review—Decree obtained by fraud if a nullity.

It is competent to a Court of inferior jurisdiction to entertain a suit to declare a Compromise decree obtained in a Court of superior jurisdiction to be not binding on the plaintiff as having been obtained by fraud, provided the suit is, as regards the amount for which the Compromise decree was passed and as regards the situation of the properties affected by and the residence of the parties to the decree, within the cognizance of the inferior Court. The mere fact that the suit in which the Compromise decree was passed was for an amount exceeding the pecuniary jurisdiction of the inferior Court does not deprive it of its jurisdiction to entertain the suit provided the decree itself was for an amount within its jurisdiction.

In such a suit the inferior Court has no jurisdiction either to set aside the decree of the superior Court or to direct that the suit in which the decree was passed should be retried and decided on the evidence.

Semble, The remedy of the plaintiff, if he succeeds in getting the declaration sought for, is to apply to the Superior Court either to revive the suit or to proceed with it

Per Srinivasaiyangar, J:—The Superior Court may also have concurrent jurisdiction to entertain the suit.

The more appropriate mode of setting aside a consent decree for fraud is by a separate suit instituted for that purpose rather than by a motion in the cause in the nature of a review.

A decree obtained by fraud is not a nullity and is not wholly void.

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* L. P. A. No. 215 of 1916 28th March 1917.

Arunachalam Chetty v. Sabapathy Chetty.

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Napier in C. R. P. No. 951 of 1916 praying the High Court to revise the order of the District Court of Coimbatore in C. M. A. No. 6 of 1916 preferred against the order of the Court of the District Munsif of Tiruppur in O. S. No. 1631 of 1915.

N. A. Krishna Aiyar for the Appellant.

N. S. Rangasami Aiyangar for *T. Narasimha Aiyangar* for the Respondent.

The Court delivered the following

Spencer, J.

Judgments :—*Spencer, J.* :—The question that has been argued in this Letters Patent Appeal is whether it is competent to a Court of inferior jurisdiction to entertain a suit to declare a compromise decree obtained in a Court of superior jurisdiction to be not binding on the plaintiff as having been obtained by fraud. The plaintiff asked in his plaint not only for a declaration that the decree in O. S. No. 20 of 1914 on the file of the District Court of Coimbatore was not binding on him but also that it should be set aside and that the said suit should be retried and decided on the evidence. The District Munsif to whom the plaint was presented held that he had no jurisdiction to go into the question whether the former decree was obtained by fraud and that only an Appellate Court or a court transferring a suit from one court to another would have the power to direct a retrial. The District Judge, who heard an appeal from the District Munsif's decision, was of opinion that a court of inferior jurisdiction could not either set aside or order a re-hearing of a suit tried by a court of superior jurisdiction.

The learned Judge of this court, who disposed of a petition to revise, the District Judge's order, gave as his reason for refusing to interfere in the matter that the suit as originally instituted was not within the pecuniary jurisdiction of the District Munsif, although the amount involved in the compromise decree was.

There seems to have been a considerable misapprehension as to the course that the court trying the question of fraud would have to follow if it decided in the plaintiff's favour. As observed in *Vijaya Ramayya* v. *Venkata Subba Row* [1] it would be sufficient for the court to declare that the previous decree was of no effect

1. (1915) I.L.R. 39 M. 853 at page 873= 30 M. L. J. 465

so far as he was concerned. Their Lordships remarked in that case that the trial of the suit, which has been improperly compromised, after a declaration to that effect would no doubt proceed if a proper application were made to the proper court. They refused in second appeal to make any order as to that. So here, the fact that the plaintiff asked for two reliefs which could not in the nature of things be granted was no reason for not deciding whether he was entitled to the declaration which he demanded if he proved that the compromise was fraudulent.

Next as regards the powers of the District Munsif to try a suit brought for a declaration that a decree obtained in the District Court was obtained by fraud, S. 9 of the Civil Procedure Code runs thus:—"The courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred." The respondent has not shown that there is any express or implied bar to such a suit as this. Under S. 56 cl. (b) of the Specific Relief Act, a court has no power to stay proceedings in a court not subordinate to it; but there is no such limit placed by S. 42 on a court that has otherwise jurisdiction over the suit making a declaration as to a plaintiff's title to a legal right and granting a permanent injunction against the decree-holder executing his fraudulent decree against the plaintiff.

If it were only the court which possessed the jurisdiction to try the suit in which the fraud was committed that could entertain a question whether a decree so obtained was vitiated by fraud, there would be no relief by suit under Art. 95, Limitation Act, for parties aggrieved by fraud perpetrated in the trial of Small Cause suits or of rent suits in revenue courts or in appeals to the Privy Council, however gross the fraud. In *Nistarini Dassi* v. *Nundoo Lal Bose* [1], Stanley, J., quoting from *Shedden* v. *Patrick* [2], observed, "It matters not whether the impeached judgment has been pronounced by an inferior tribunal or by the highest court of judicature in the realm; in all cases alike it is competent for every court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud." His judgment was upheld in appeal by a Bench of three Judges in *Nistarini Dassi* v. *Nundoo*

1 (1899) I. L. R. 26 Cal. 891. 2. (1854) 1 Macq. H. L. C 607.

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Lal Bose [1], (see observations of Maclean, C. J., at page 381-2) and confirmed by the Privy Council in *Benode Behary Bose* v. *Nistarini Dassi* [2].

In *Banke Behari Lal* v. *Pokhe Ram* [3], and *Jawahir* v. *Neki Ram* [4], it was held that a Subordinate Judge and a District Munsif could try suits to declare that decree passed by the Calcutta High Court and by another court in Bengal respectively were void as against the plaintiff, when the cause of action arose within the jurisdiction of the former courts owing to execution proceedings having been taken in that locality.

As regards pecuniary jurisdiction the compromise decree was for Rs. 1,700 and interest, and that is therefore the extent to which the interests of the plaintiff in this suit have suffered. It is not suggested that there has been any undervaluation. The property is situated and the defendant resides within the jurisdiction of the Tiruppur District Munsif's Court. Under S. 12 of the Civil Courts Act the Tiruppur District Munsif's court is the proper court to try the suit unless it is shown to be 'otherwise exempted from his cognizance'. I am not aware of any provision of law which has the effect of exempting from the jurisdiction of a court, otherwise competent to try them suits brought to avoid decrees obtained in suits when the original plaintiff claimed in his plaint more than he got by the final decree.

I consider therefore that this appeal should be allowed and the District Munsif of Tiruppur should be directed to restore O. S. No. 1631 of 1915 to his file and dispose of it according to law. Costs throughout to abide and follow the result.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—I agree. The question in this appeal is whether one court has jurisdiction to entertain a suit to set aside the decree of another court, in this case a superior court, on the ground of fraud. The present suit was filed in the Munsif's Court, Tiruppur, to set aside a mortgage decree passed by consent by the District Court, Coimbatore, for a sum of Rs. 1,700 in favour of the defendant against the plaintiff in a previous suit in that court by the former against the latter to recover a sum of money which was beyond the pecuniary jurisdiction of the Munsif. The lands charged are wholly within the local

1. (1902) I. L. R. 30 C. 369.
2. (1905) I. L. R. 33 Cal. 180.
3. (1902) I. L. R. 25 A. 48.
4. (1914) I. L. R. 37 A. 189.

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limits and the value of the relief sought is within the pecuniary limits of the jurisdiction of the Munsif. The plaintiff's claim is to relieve himself from the liability to pay Rs. 1,700 under previous decree and to get rid of the charge on his lands for the same amount. The defendant also lives within the jurisdiction of the Munsif.

It is now quite settled that the more appropriate mode of setting aside a consent decree for fraud is by a separate action instituted for that purpose where charges of fraud can be fully investigated, rather than by a motion in the cause in the nature of a review; but such a suit is not, I think, the same as an action of review or the old bill of review. (*Mussamut Gulab Koer* v. *Badshah Bahadur* [1]. Legislative recognition of this mode of procedure is afforded by article 95 of the Limitation Act. A suit instituted for that purpose is an ordinary civil suit and the jurisdiction of the court to entertain such a suit must depend on the provisions of the Civil Courts Act and the Code of Civil Procedure. It was not said that suits to set aside decrees were exempted from the cognizance of Munsiffs and under S. 12 of the Civil Courts Act therefore Munsiffs have jurisdiction to try suits of this class. If the suit is considered to be one for the determination of a right to or interest in immoveable property, the District Munsif's court, Tiruppur, was the proper court to try it (S. 16 of the Code); otherwise the same court will have jurisdiction to try it as the defendant actually and voluntarily resides within the local limits of its jurisdiction (S. 20 of the Code). If for instance the plaintiff in the present suit had executed a mortgage deed in favour of the defendant for Rs. 1,700 and interest on the security of the property charged by the decree in satisfaction of his claim in the previous suit and if that suit had been withdrawn or dismissed as adjusted without there being a decree and if the present suit was to set aside the mortgage on the ground of fraud, there can scarcely be any doubt that the District Munsif of Tiruppur would have jurisdiction to entertain it. For the purpose of determining the court in which the suit should be filed I do not see any difference between the 2 suits. The District Judge may also have concurrent jurisdiction, but the suit must be instituted in the District Munsif's court as that is the court of the lowest grade competent to try it. That is how the matter stands on the construction of the relevant

1. (1909) 10 C. L. J. 420.

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portions of the statutes which prescribe or limit the jurisdiction of courts.

A certain amount of confusion has, however, arisen by not keeping quite distinct the question of the appropriate relief or reliefs which a court can grant in a suit to set aside a decree or the consequence which follow the setting aside of a decree, from the question of competency of the court to try the suit. In this very suit the plaintiff after praying that the consent decree should be set aside, further prayed that the court should direct the previous suit in the District Court to be retried and decided on the evidence; this latter relief he was not entitled to in the suit and the District Munsif was not competent to grant it. If the plaintiff succeeds in the suit, and gets the consent decree set aside, any application in the previous suit, either to revive it or proceed with it can only be made to the court in which that suit was pending and it is only that court that can make any order in respect of that suit; but that in no way affects the jurisdiction of the Munsif to try the suit to set aside the decree. What exactly are the forms of reliefs which a court can grant when a party establishes his right to set aside a decree for fraud need not be considered or specified now as they may conceivably depend on the nature of the decree sought to be set aside and other circumstances of the case. Ordinarily a declaration that the decree is not binding on the plaintiff and an injunction restraining the other party from executing it, would be sufficient and proper.

The learned District Judge in his judgment in appeal in this case draws a distinction between the jurisdiction of the court to treat a decree obtained by fraud as a nullity when the impeachment of the decree arises incidentally or is only one of the reliefs prayed, and the jurisdiction of the court where the impeachment of the decree is the sole object of the suit. It is quite possible that a court which has jurisdiction over a cause, may have jurisdiction to decide on the validity of a decree though if the suit was wholly to set aside that decree it may have no jurisdiction on the ground that no part of the cause of action arose within its local limits or the defendant did not reside there. That difference arises, not out of any distinction between a direct and collateral impeachment of the decree, not out of any difference in the nature of the suits, but arises solely out of the difference in the place of suing as determined by the provisions of

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the code or any other law determining the venue. I do not understand how a court which is not competent to adjudicate directly on the validity or the invalidity of a decree can do so indirectly. If a decree obtained by fraud is a nullity and is wholly void, (which I think it is not in spite of some expressions to the contrary in the reported judgments), the court may ignore it; but if it is binding till set aside, the fact that it is impeached in a suit in which other or substantial reliefs are asked which depend or are consequential on the setting aside of, the decree cannot confer a jurisdiction which otherwise the court did not possess. The recent decisions of the Calcutta and Allahabad High Courts some of which were confirmed by the Privy Council support the view taken above. In an early case in Calcutta, Pontifex, J., in connection with an application to take the plaint off the file on the ground that leave to sue was not obtained is reported to have said that "where the principal part of the prayer of the suit was to set aside a consent decree of the High Court in a previous suit, that court and that court alone, had jurisdiction." (*Bibee Soloman* v. *Abdool Aziz* [1]). In that case the whole cause of action appears to have arisen within the local limits of the original jurisdiction of the High Court as the fraud which gave rise to the action was committed within the local limits. The suit itself appears to be one in which substantial relief for the recovery of property appears to have been claimed and the previous decree which limited the right of the plaintiff was sought to be set aside as a preliminary to obtain such relief. If that be so, the later decision of the same court on the Original Side in *Nistarini Dassi* v. *Nundoo Lal Bose* [2] which was confirmed in appeal, which again was confirmed by the Privy Council, is conclusive authority for the position that a court which has jurisdiction over the cause has jurisdiction to set aside the decree of another court on the ground of fraud as an auxiliary to the granting of the other reliefs (*Nistarini Dassi* v. *Nundoo Lal Bose* [2], *Nistarini Dassi* v. *Nundoo Lal Bose* [3], *Benode Behari Bose* v. *Srimat Nistarini Dassi* [4]. I would draw particular attention to the judgment of Chief Justice Maclean in appeal at pages 380 and 381, I. L. R. 30 C. where the question of jurisdiction of one court to set aside the decree of another court for fraud is discussed with

1. (1879) 4 Cal. L. R. 266.
2. (1899) I. L. R. 26 C. 891.
3. (1902) I. L. R. 30 C. 369.
4. (1905) L. R. 32 I. A. 193=33 Cal. 180.

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reference to the Indian statutes. In *Kedar Nath Mukerjee* v. *Prosanna Kumar Chatterjee*,[1], the suit was to set aside on the ground of fraud a decree of a Small Cause Court, at Krishnagar and sale of immoveable properties in execution of that decree on transfer by a Munsif's Court. The plaintiff also claimed to recover possession of the property sold in execution and instituted the suit in the Munsif's Court. On objection taken, the jurisdiction of the Munsif to entertain the suit was sustained, but the learned Judges were disposed to hold that if the action was brought simply to set aside the decree, the suit should have been instituted in the Krishnagar Civil Court. It is important to note that the learned Judges say that the suit to set aside the decree of the Small Cause Court *would not lie in that court*, but would have to be brought in the ordinary Civil Court, and it may be that Krishnagar Civil Court was the only court, which could take cognizance of a suit under the Code of Civil Procedure, if it was simply to set aside the decree.

The precise question now raised, came up for decision in *Sarthakram* v. *Nundo Ram*[2], and the Calcutta High Court decided that Munsif's Court had jurisdiction to declare that a decree obtained by fraud in a Subordinate Court was not binding on the plaintiff and to grant an injunction restraining the defendant from executing the decree. There also the decree in the previous suit was for a sum which was within the pecuniary jurisdiction of the Munsif, though apparently the claim was for an amount above it. In this judgment the learned Judges appear to draw a distinction between 'setting a side adecree' and declaring it to be a nullity; but what exactly is the difference is not explained. No doubt one court has no control over the record of another court, and one court setting aside the decree of another court on the ground of fraud in an action brought for that purpose, does not do so in the sense in which a judgment is vacated in appeal or on review. The consequences are, or may be, different; further in the latter case directions may be given as to revivor, new trial or continuance of the proceedings and the court may even enter a fresh judgment in the old suit. Again there may be matters over which particular courts have exclusive jurisdiction as for instance Probate Courts. If an order or decree is passed by such courts in matters within their exclusive jurisdiction, such order or decree cannot be set

1. (1901) 5 C. W. N. 559. 2. (1906) 11 C. W. N. 579.

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aside by another court, though the latter court may be able to make a declaration, that a party was guilty of fraud in obtaining that order, (See *Priestman* v. *Thomas* [1]). In *Earl of Bandon* v. *Becher* [2], Lord Brougham said "it is undeniably true that the Court of Chancery has no right to review a decree of the court of Exchequer; that nothing but a Court of Appeal can give redress if such decree is erroneous, is clear, and indeed nothing can be more true than such a proposition; but it is equally true, that if the decree has been obtained by fraud it shall avail nothing for or against the parties affected by it, to the prosecution of a claim, or to the defence of a right". How far such a distinction applies to courts exercising the same or similar jurisdiction as the ordinary civil courts in British India may be a question. If however that was the distinction made by the learned Judges in *Sarthakram* v. *Nundo Ram* [3], as probably it was, that does not affect the present question. In a later case in the same Court, *Abdul Huq Chowdhry* v. *Abdul Hafiz* [4], the suit was instituted in a Munsif's Court to set aside a decree of the Presidency Small Cause Court. The jurisdiction of the Munsif was upheld and the learned Judges pointed out that where a decree is set aside on the ground of fraud an injunction restraining execution is necessarily consequential thereon, even where no other relief is sought and that such a decree is more than a mere declaratory decree. They followed their previous decision in *Sarthakram* v. *Nundo Ram* [3] and also another decision *Prannath Roy* v. *Monesh Chandra Moitra* [5] which was confirmed by the Privy Council. See *Radha Raman Shaha* v. *Pran Nath Roy* [6], and *Khagendra Nath Mahata* v. *Pran Nath Roy* [7]. In these cases the main question in dispute was whether a party who had applied to the court which passed the decree, under Ss. 108 and 311 of the old Code, to set aside an exparte decree and a sale in execution of it, can sue to set them aside on the ground of fraud in a fresh suit. Their Lordships in the Privy Council confirming the judgment of the High Court held that he can; but these cases are important for the present purpose for two reasons. In the first place though relief by way of recovery of possession of immoveable property sold in execution of the fraudulent decree was asked, their Lordships do

1. (1884) L. R. 9 P. D. 70 in appeal, page 210.
2. (1835) 3 C. and Fin. 479 at 510 : 6 Eng. Rep. 1517.
3. (1906) 11 C. W. N. 579.
4. (1910) 14 C. W. N. 695.
5. (1897) I. L. R. 24 C. 546.
6. (1901) I. L. R. 28 C. 475 (P.C.)
7. (1902) L. R. 29 I. A. 99=29 Cal. 395.

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not appear to think that this made any difference, for they describe the suit as one "for setting aside a decree and auction sale on finding them to be illegal, fraudulent and conclusive"; in the next place though the previous decree was passed and the auction held by the Munsif, the suit to set them aside was instituted in a different Court, the Court of the Subordinate Judge. These two decisions of the Privy Council appear to me to conclude the question in the present appeal.

The latest case in Allahabad is *Jawahir* v. *Neki Ram* [1]. There a suit was instituted in the Munsif's Court, Fatehabad (Agra) to set aside a decree of a court in Silguri in Bengal. The learned Judges held that the Munsif had jurisdiction. They based their judgment on the ground that a portion of the cause of action at least arose within the jurisdiction of the Fatehabad Munsif as the fraudulent decree was sought to be executed by attaching properties situate within his local jurisdiction and they followed an earlier case in the same court where it was held that it was competent for the Cawnpore Court to set aside a decree of the Calcutta High Court. (*Banke Behari Lal* v. *Pokke Ram* [2]). The decision in *Banke Behari Lal* v. *Pokke Ram* [2], was followed in this Court in *Arunachallam Chetty* v. *Vellappa Thambiran* [3] by the Chief Justice and Hannay, J.

There was a reference made to S. 56 of the Specific Relief Act, but that section has no application to the present case, for the court is not asked to stay any proceedings in a superior court.

The respondent broadly contended that there was some principle of law which obliged a party desirous of setting aside a decree obtained by fraud, to seek relief in the Court which passed the decree; but except the dictum of Pontifex, J., he did not refer to any other authority. If that contention is correct, a Court of appeal which has no original jurisdiction and a Small Cause Court or a Revenue Court which has only a limited jurisdiction cannot entertain an original suit to set aside its decree, and no other court can. This however does not appear to be the law. In *Flower* v. *Lloyd* [4], the Court of Appeal in England held that that court had no original jurisdiction to hear an application to set aside their decree passed in appeal on the ground of fraud, but that a fresh action should be brought in a Court having original

1. (1914) I.L.R. 37 A. 189.
2. (1902) I. L. R. 25 A. 48.
3. (1914) 28 M.L.J. 140.
4. (1877) 6 Ch. D. 297.

jurisdiction to set aside the decree. In the same case Baggallay, L. J., no doubt said that under the old practice when a decree had been obtained by fraud a bill was filed in the original court in which suit had been brought for the purpose of setting the decree aside and the same may be done even after the Judicature Acts came into force. I doubt, however, whether the Lord Justice was thinking of Courts of different grades exercising similar jurisdiction. I therefore think that the District Munsif of Tiruppur had jurisdiction to entertain the suit, though he had no power to grant the second prayer of the plaint which however did not affect the jurisdiction of the court. It may be mentioned that the plaintiff agreed to withdraw their prayer in the first court.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR.

Damodara Shanabhaga ... *Petitioner* (Plaintiff).*

v.

Subraya Pai ... *Respondent (Defendant.)*

Partnership—Contribution, suit for, as between partners, when maintainable—Dismissal of suit—Interference in revision.

Plaintiff's assignor and the defendant, who were sole partners in trade, borrowed money from a stranger for partnership purposes. The creditor obtained a decree against both the partners but the whole of the decree amount was paid only by the plaintiff's assignor who transferred to the plaintiff his alleged right of contribution against the defendant. In a suit by the plaintiff for such contribution, it was found that the partnership between the plaintiff's assignor and the defendant was still subsisting, that if accounts were taken between the plaintiff's assignor and the defendant, nothing would probably be due to the plaintiff's assignor, and that the assignment to the plaintiff was made by his assignor in order to get over the difficulty of himself obtaining a decree against his co-partner.

Held that, in the circumstances of the case, there was no ground for departing from the general rule that one partner cannot sue another except for a dissolution and the taking of the general accounts of the partnership and that, the suit having been dismissed by the Court below, there was no ground for interference by the High Court in the exercise of its discretionary jurisdiction under S. 25 of the Provincial Small Cause Courts Act.

Petition under Sec. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Karkal in S.C.S. No. 404 of 1915, dated the 15th February 1916.

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* C. R. P. No. 663 of 1916. 17th July, 1917.

Damodara Shanabhaga v. Subraya Pai.

Sadasiva Aiyar, J.

B. Sitarama Rau for Petitioner.

K. Yegnanarayana Adiga for Respondents.

The Court delivered the following

Judgment:—The plaintiff is the petitioner. The plaintiff's assignor, Lakshmana Kamthi, and the defendant were partners in trade. The two partners borrowed money from a stranger for the partnership purposes. A decree was passed against both on 2-12-1912 (See Exhibit VI). The plaintiff's assignor alone was arrested and he paid the whole amount (Rs. 66 odd) and he transferred to the plaintiff his alleged right of contribution against the defendant. Hence the plaintiff has brought this suit for obtaining such contribution. The District Munsif dismissed the suit on the ground that, unless there had been a dissolution of partnership between the plaintiff's assignor and the defendant, no claim for contribution could arise between the partners. I do not think that it could be stated that it is an invariable rule of law that no suit against a partner could under any circumstances be maintained for contribution even in respect of a distinct and separate transaction though connected with the partnership business. In *Karri Venkata Reddi* v. *Kollu Narasayya* [1], Sir Arnold White, C. J., and Abdur Rahim, J., held "It has never been a hard and fast rule that the court will not interfere in a dispute between the partners, simply because the dispute relates to a matter connected with the partnership business; and, apart from any technical rules relating to the form of action, the grounds for non-interference would seem to be co-extensive with the inability of the court to give any effective relief, *or the inexpediency of giving the relief sought* having regard to the essential characteristic of a contract of partnership *and the justice of the case.*" In *Beecham* v. *Smith* [2] it was held that if one partner gave to his co-partner a note which bound only the partner who gave it *and not the firm*, he might be sued by his co-partner thereon, whatever the state of the accounts between the two might be and although the bill or note in question had reference to some partnership transaction; "for, by giving the bill or note, the demand in respect of which it was given was isolated from the general partnership account". In *Sedgwick* v. *Daniell*, [3] it was held that if *some* of a number of partners gave their pro-

1. (1908) I. L. R. 32 M. 76. 2. (1858) E.B. & E. 442 : 120 Eng. Rep. 574.
3. (1857) 2 H. & N. 319=157 E. R. 132.

Damodara Shanabhaga v. Subraya Pai

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missory note for better securing the payment of a debt owing by them and their co-partners and one of the makers of the note was compelled to pay the whole amount of it, he was entitled to sue each of *the other makers* of the note for his proportion of the sum so paid. But his right to sue the *other partners who did not join in making the note* has not been established in the English cases *in the absence of special circumstances.*

In the present case, the plaintiff's assignor and the defendant seem to have been the sole partners, and though the plaintiff's assignor was obliged to pay up the whole, I do not think in the absence of special circumstances, the general rule that one partner cannot sue another except for a dissolution and the taking of the general accounts of the partnership need be departed from in this case. I am the more unwilling to do so, because, it seems to have been conceded before the District Munsif in the lower court that if the debt borrowed under the joint promissory note was a partnership debt, the plaintiff's claim was unsustainable. (See paragraph 6 of the judgment). It also appears (See paragraph 9) that the assignment to the plaintiff was made by his assignor in order to get over the difficulty of himself obtaining a decree against his co-partner. The District Munsif was entitled to infer that, if the partnership accounts were taken between the plaintiff's assignor and the defendant, nothing would probably be due to the plaintiff's assignor even after giving credit in his favour to the amount paid by him in satisfaction of the joint promissory note debt incurred for the partnership purposes and that therefore "the justice of the case" did not require the court to depart from the usual rule.

As for the cases *Subbarayadu* v. *Adinarayadu* [1] *Sokkanada Vanni Mundar* v. *Sokkanada Vanni Mundar* [2] *Sadhu Narayna Aiyangar* v. *Ramaswami Aiyangar* [3], and *Laban Sardar* v. *Choyen Mallick* [4], it does not appear in the first case that the partnership had not been dissolved before the suit was brought. *Subbarayadu* v. *Adinarayadu* [1] relies on *Sedgwick* v. *Daniel* [5]. The latter was a case (as I have already shown) where only some of the several partners gave a promissory note for an already existing partnership debt. The decision in *Subbarayadu* v. *Adinarayadu* [1] was again the decision of a single though very

1. (1894) I. L. R. 18 M. 134. 2. (1904) I. L. R. 28 M. 344.
3. (1908) I. L. R. 32 M. 203. 4. (1914) 19 C. W. N. 768=29 I. C. 811.
5. (1857) 2 H. & N. 319.

Damodara Shanabhaga v. Subraya Pai.

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learned Judge. In *Sokkanada Vanni Mundar* v. *Sokkanada Vanni Mundar* [1] a suit for a share of particular assets was brought *long after the dissolution*, and even in that case, it was laid down that the defendant would be entitled to show that if the general accounts are taken, the plaintiff would be entitled to nothing. *Sadhu Narayana Aiyangar* v. *Ramaswami Aiyangar* [2] was also a case which arose *after the dissolution* of the partnership and it followed *Sokkanada Mundar* v. *Sokkanada Vanni Mundar* [1]. In the present case, the District Munsif finds (See paragraph 6) that the partnership between the plaintiff's assignor and the defendant has not been dissolved; that is, that it still existed— The jurisdiction of this Court to interfere in revision is a discretionary one, and on this ground also I do not think that this is a fit case under these circumstances for revision. The petition is therefore dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE AYLING AND MR. JUSTICE NAPIER.

Gangadharan Pattar and others... *Appellants** (*Defendants 1, 4 and 5.*)

v.

Patinhara Kovilakath Thazhathe Manavikraman *alias* Cheria Kunjunni Rajah Avl. and others. *Respondents* (*Plaintiff and Defendants 2, 3, 6, and 7.*)

Gangadharan Pattar v. Patinhara Kovilakath Manavikraman.

Malabar Law—Verumpattam, incidents of—Lease for a year unless otherwise specified—Notice to quit—Whether a six-months' notice necessary—Assignment of lessor's interest—Notice to a tenant—Subsequent suit by original lessor against tenant—Decree for rent—Assignment not pleaded in defence—Whether decree bars suit by assignee for rent.

Verumpattom is a lease which runs only for a single year unless otherwise specified. At the end of the year the landlord is at liberty either to renew the lease or let the land to another tenant. The period of twelve years presumed in the case of a Kanom has no application to Verumpattam.

A Verumpattam lessee is not entitled to a six months' notice. In the absence of any statutory provision he is only entitled to a reasonable notice which is a question of fact to be decided in each case according to the particular circumstances and the local custom as to reaping of crops and cultivating land.

Where a lessor assigns the whole or any portion of his interest and the assignee gives notice of such assignment to the tenant any decree for rent, in favour of the original lessor against the tenant in a suit to which the assignee is not a party will not preclude the assignor to recover rent for that period from the tenant if the latter did not plead the assignment as a defence to the original lessor's suit for rent.

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* S. A. No. 581 of 1916. 6th March 1917.

1. (1904) I. L. R. 28 M. 344.
2. (1908) I. L. R. 32 M. 203.

Gangadharan Pattar *v* Patinhara Kovilakath Manavikraman.

Second Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in A.S.No. 426 of 1915 preferred against the decree of the Court of the District Munsif of Alattur in O. S. No. 463 of 1913.

C.V. Ananthakrishna Aiyar and *P.V. Parameswara Aiyar* for Appellants.

T.R. Ramachandra Aiyar and *A. S. Venku Aiyar* for respondents.

The Court delivered the following

Judgment:—This is a suit by a Melcharatdar from the stani, the 4th Rajah of Calicut, to recover possession of certain property held by the defendant under a lease from that stani, and also to recover the arrears of rent which had been assigned in the melcharath. The Melcharatdar gave the defendant notice to quit, Exhibit C. The defendant set up that under his lease, he was entitled to a right of permanent occupancy or alternatively to hold for 12 years. The District Munsif on the construction of the document and on the evidence of surrounding circumstances and on the evidence of plaintiff's witnesses 3 and 4, one of whom was a clerk of the stani upheld the contention that it was for a term of 12 years. The Subordinate Judge on appeal has declined to act on the evidence of plaintiff's witnesses 3 and 4, or to attach any special characteristics to Verumpattom leases from the Rajahs of Calicut and holding that this is an ordinary Verumpattom lease negatived the claim for 12 years. The points urged before the District Munsif are pressed on us here and great stress is laid on the fact that this property has been held since 1870 and that there have been three renewals which it is urged, prove the payment of a renewal fee. If the renewals had been at the end of periods of 12 years, there might have been some force in this argument, but the dates are 1870, 1881, 1888 and 1902. In our opinion those dates are against the contention of the appellant. The document itself is silent as to the term, but contains a provision that the rent shall be paid in Makaram of every year. We agree with the Subordinate Judge that this is a Verumpattom lease. The nature of such a lease has been explained many years ago in the proceedings of Sadar Adawlat Court of August 5, 1856. These proceedings have been held in *Teyyan Nair* v. *Zamorin of Calicut*[1] and *Achutha Menon* v. *Sankara Nair*[2] and by this

1. (1903) I. L. R. 27 M. 202. 2. (1911) I. L. R. 36 M. 380.

Gangadharan Pattar v Patinhara Kovilakath Manavikraman.

Bench quite lately to be authoritative. The description is as follows :—Verumpattom-simple lease. "This lease runs only for a single year unless otherwise specified. At the end of the year the landlord is at liberty either to renew the lease or to let the land to another tenant; but he cannot under any circumstances disturb the tenant in his enjoyment until the year has expired. Where the lease is for a specified period, the tenant cannot be ejected during that period unless he endeavours to defraud the landlord or allows the rent to fall into arrears. In either case, however, an action of ejectment will lie against the tenant". (Proceedings of the Court of the Sadar Adawlat No. 18, dated 5th August 1856). It is clear therefore that the 12 years presumed in the case of a Kanom has no application to a Verumpattom. We must therefore treat this as a lease from year to year and accordingly the suit was not premature. The next question is as to the sufficiency of notice contained in Ex.C. This is dated 16th January 1913 and gives notice to quit on or before 26th February 1913. The Subordinate Judge has found that this is timely notice. It is urged that he has ignored the principle that notice must be for the end of a term and must also allow 6 months. Admittedly there is no statutory provision but the English Law is relied on, and the principles enunciated in the Transfer of Property Act. The chief authority relied on in support of this contention is *Kishori Mohun Roy Chowdhry* v. *Nund Kumar Ghosal* [1]. This case was treated as one not of general application in *Digambar Mahto* v. *Jhari Mahto* [2], in which the learned Judges have preferred to follow the rule laid down in a long series of cases, *Jugut Chundar Roy* alias *Bashi Chander Roy* v *Rup Chand Chango* [3] *Radha Gobind Koer* v. *Rokhal Das Mukerji* [4] *Bindumukhi Debea Chowdhrain* v. *Kefyutullah* [5] and *Kali Kishen Tagore* v. *Golam Ali* [6]. The true general principle is stated by Field, J., in the earliest of these cases. Thus "what is reasonable notice is a question of fact which must be decided in each case according to the particular circumstances and the local customs as to reaping crops and letting land". The same view has been adopted by this court in a recent case *S.R.M.A.R. Ramaswami Chettiar* v. *Kathan Amabalagaran* [7] and in a still more recent case S.A.No. 272 of 1915. We entirely

1. (1897) I. L. R. 24 C. 720.
2. (1899) I L. R 26 C. 761.
3. (1882) I. L. R. 9 C. 48.
4. (1885) I. L. R. 12 C. 82.
5. (1885) I.L R. 12 C .93.
6. (1886) I L. R. 13 C. 3.
7. (1915) 28 I.C. 915.

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agree that there is no right to a 6 months' notice. With regard to the date fixed in the notice for relinquishment, the exact synchronising of that with the termination of the lease period is only of importance in so far as it prevented difficulty in apportionment. (Vide *Kishori Mohan Chowdhury* v. *Nand Kumar Ghosal*[1]. In the present case the notice period expired on February 26, 1913. The renewal referred to in Exhibit B was dated March 9th. The whole rent for the year was payable before the end of Makaram which is prior to February 26th, and both dates are admittedly after the end of the cultivation season. No difficulty as to apportionment of rent could therefore possibly arise. There is therefore no legal objection to the finding of the Lower Appellate Court that the notice was timely. There remains two other points. The finding of the Subordinate Judge as to improvements is one of fact and cannot be contested here. As to the decree for 3 years arrears of rent it is true that the stani had already got a decree for that prior to this suit, but the plaintiff was not a party to that suit and is entitled to recover the rent on his assignment, notice of which had been given to the defendant. If he did not choose to plead the assignment as a defence to the Small Cause Court suit he cannot rely on the decree in that suit against the plaintiff's claim. The appeal must therefore be dismissed with costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT:—MR. JUSTICE AYLING, MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE BAKEWELL.

Kasaribada Venkatachelapati Rao... *Appellant* (Appellant — decree-holder.)*

v.

Maddipatla Kameswaramma *alias* Kamakshamma. *Respondents (2nd respondent— Judgment-debtor's L. R.)*

F. B.

Venkatachelapati Rao v. Kameswaramma.

Stay of execution—Order becomes effective only when communicated to the Lower Court.

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* A. A. A. O. No. 128 of 1916. 19th September, 1917.

1. (1897) I. L. R. 24 C. 720.

F. B.

Venkatachelapati Rao v. Kameswaramma.

An order by the Appellate Court for stay of execution takes effect only when it is communicated to the Lower Court; and an attachment ordered by the Lower Court after the passing of the order for stay of execution but before it was communicated, is valid. *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar* [1] approved.

Appeal against the Appellate order of the Court of the Temporary Subordinate Judge of Kistna at Ellore in Appeal Suit No. 118 of 1915, preferred against the order of the Court of the District Munsif of Narsapur in C. M. P. No. 1950 of 1914 in Original Suit No. 38 of 1912.

The appeal came before Abdur Rahim and Bakewell, JJ., in the first instance and the court made the following

ORDER OF REFERENCE TO A FULL BENCH:

In this case the appellant decree-holder obtained an order of attachment of certain properties of the judgment-debtor on the 14th March 1914 and attachment was actually carried out on the 17th March. It appears that the judgment-debtor who had filed an appeal against the decree made an application for stay of execution and obtained an interim order staying execution till the disposal of the appeal, on the 13th March 1914. This order was finally vacated on the 15th April, the judgment-debtor having failed to furnish security as required by the Appellate Court. In the meantime, that is, after the order for interim stay was passed, and before that order was set aside, the judgment-debtor sold the property to a third person. The question that we have been asked to consider in the appeal is whether the order of attachment of the 14th March has any effect so as to affect the alienation subsequently made by the judgment-debtor or whether the attachment must be held to be *ultra vires* and ineffectual because of the fact that the Appellate Court had made an interim order of stay previous to the date of attachment, though it was not communicated to the Court that passed the order of attachment and the decree-holder had no knowledge of it at the time he made the application.

The question, so far as the principle involved is concerned, was decided by a bench of this Court in a case reported in *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar* [1] where it was laid down accepting the view of the law

1 (1909) I. L. R. 33 M. 71.

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laid down by the Calcutta High Court in *Bessesswari Chowdhurany* v. *Horro Sundar Mozumdar* [1], that an order of the Appellate Court granting interim stay does not operate so as to suspend proceedings in execution before the first Court before the date of its communication to the latter Court. The learned Judges had before them another ruling of the Calcutta High Court in *Hukum Chand Boid* v. *Kamalanand Singh* [2], which was to the contrary effect, but they preferred the view expressed in *Bessesswari Chowdhurany* v. *Horro Sundar Mozumdar* [1]. In a subsequent case in this Court in *Ramanathan* v. *Arunachellam* [3], the same question came up for consideration before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer. Mr. Justice Sadasiva Ayyar expressly dissented from the decision in *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar* [4], and Mr. Justice Spencer also seemed to be inclined to the same opinion though he thought that the case in *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar* [4], might be distinguished from the case which he had to deal with. We are inclined to agree with the earlier ruling of this Court in *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar* [4]. We think that it is ordinarily the duty of a division bench to follow on a pure question of law a previous ruling of another division bench unless it is of opinion that that ruling is wrong in which case the proper course is to refer the question to a full bench so that the law on the point may be conclusively ascertained so far as this High Court is concerned. Having regard however to the fact that dissent has been expressed by Mr. Justice Sadasiva Ayyar and also by Mr. Justice Spencer from the view of the law expressed in *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar* [4], it is necessary that the question involved which is one of importance should be settled by a Full Bench.

The Court which passed the decree has full jurisdiction to proceed with its execution until its hands are stayed by the order of the Appellate Court, and it is difficult to see how that Court, if a proper application for execution is made to it, could refuse the application until the order of the Appellate Court granting stay of execution has been communicated to it. There can be no doubt that an order for prohibitory injunction, so far as it affects the

1. (1892) 1 C. W. N. 226.
2. (1905) I. L. R. 33 C. 927.
3. (1913) I. L. R. 38 M. 766.
4. (1909) I. L. R. 33 M. 74.

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question of validity of any act of the party against whom it is made is concerned, does not come into operation until it is communicated to him. The Civil Procedure Code expressly lays down that the mere preferring of an appeal will not operate to stay execution. It seems to follow that until the first Court receives the order of the Appellate Court staying execution, it is bound to proceed to excute the decree on proper application being made to it by the judgment-creditor. It is then difficult to conceive how an order, which the Court of first instance was bound by law to pass, could be said to be made without authority. The grounds of convenience seem also to preponderate against the opposite view. The question which we refer to the Full Bench is :—

Where subsequent to an interim order for stay of execution made by the Appellate Court without notice to the decree-holder but before its communication to the Court of first instance, an order for attachment has been made by the latter Court, is the order of attachment void and ineffectual as having been made without jurisdiction ?

V. Ramesam for Appellant.

P. Narayanamurthi for Respondent.

The Court expressed the following

Ayling, J.

Opinion :—*Ayling J.* :—With all respect to the views of the learned Judges in *Hukum Chand Boid* v. *Kamalanand Singh* [1]. I prefer to follow the reasoning of an earlier Bench of the same Court, in *Bissesswari Chowdhurany* v. *Horro Sundar Mozumdar* [2], which has been adopted by this Court in *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Ayyangar* [3]. I regard an order of an Appellate Court staying execution as in the nature of a prohibitory order to the Lower Court which becomes effective only on communication. Till it is communicated steps in execution taken by the Lower Court must be treated as legally valid.

I would answer the reference in the negative.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—Notwithstanding the high regard I entertain for the opinions of the two learned Judges who decided *Hukum Chand Boid* v. *Kamalanand Singh*, [1] and to the opinion

1. (1905) I. L. R. 33 Cal. 927. 2. (1892) 1 C. W. N. 226.
3. (1909) I. L. R. 33 M. 74.

of Sadasiva Aiyar, J., I am unable to agree with their conclusions. In my opinion, sufficient attention has not been paid by these learned Judges to the provisions of Order 41, Rule 5. The legislature has enacted by that rule that the Court of first instance still retains jurisdiction to order execution notwithstanding the fact that an appeal has been preferred against its decision. That power can only be taken away by some communication made to it by the court to which it is subordinate and to which an appeal has been preferred. A Court exercising jurisdiction which is conferred on it in express terms cannot be regarded as having been deprived of it unless the superior authority informs it that that has been done. This principle of jurisprudence should not be departed from unless there is any legislative provision to the contrary.

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Seshagiri Aiyar, J.

As regards the citation of the American authorities, I wish to point out that it appears from what is said in Spilling on Injunction, Vol. II, S. 1713, that the preferring of an appeal operates in some of the States to suspend the powers of the Court below. In that view, it may be justifiable to hold that the lower Court need not be informed of the action taken by the Court of appeal.

I agree in holding that *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Ayyangar* [2] was rightly decided. My answer to the reference is in the negative.

Bakewell, J:—I agree with Mr. Justice Ayling.

Bakewell, J.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, AND MR. JUSTICE KUMARASWAMI SASTRI.

Vinjanampati Peda Venkanna and another. ... *Appellants* * (*Defendants 2 and 4.*)

v.

Vadlamannati Sreenivasa Deekshatulu ... *Respondent* (*Plaintiff.*)

Hindu Law—Father—Liability of son on promissory note executed by father after partition in renewal of a note executed before—Debts of father—Pious obligation of son, extent of.

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A Hindu son cannot be made liable during his father's life-time on a promissory note executed by his father after partition, in renewal of a note executed by him before partition.

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* S. A. No. 339 of 1916. 28 August, 1917.

1. (1905) I. L. R. 33 Cal. 927.
2. (1909) I.L.R. 33 M. 74.

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The decision of the Judicial Committee in *Sahu Ram Chandra* v. *Bhup Singh* does not overrule the course of decisions in this country affirming the right of a creditor of a Hindu father whose debt has not been incurred for an illegal or immoral purpose, to join the father and his sons in a suit on the debt and to bring to sale in execution of the decrees in such suit the interest both of the father and his sons in the joint family property.

Per Kumarasami Sastri, J. The decision in *Sahu Ram Chandra* v. *Bhup Singh*[1], makes it clear that it is the primary duty of the father to pay debts incurred by him not for any family necessity but for his own purposes and that the pious duty of the son only arises when the assets of the father are insufficient assuming that it arises at all during the life-time of the father. In other words, the pious duty is limited to the debts which the father is unable to satisfy out of his share or his self-acquired properties.

Second Appeal against the decree of the District Court of Guntur in Appeal Suit No. 8 of 1915 preferred against the decree of the Court of the Additional District Munsif of Bapatla in Original Suit No. 170 of 1913.

M. O. Parthasarathi Aiyangar for Appellants.

A. Krishnaswami Aiyangar and *V. Ramadoss* for Respondents.

The Court delivered the following

Wallis, C. J.

Judgments :—*The Chief Justice* :—The question in this Second Appeal is whether a son can be made liable, during his father's life-time, as held by the District Judge, on a promissory note executed by his father after partition in renewal of a note executed by the father before partition. One of the contentions raised by Mr. Parthasarathy for the appellant is that since the recent decision of the Judicial Committee in *Sahu Ram Chandra* v. *Bhup Singh*,[1] payment of the father's debts cannot be enforced by suit against the sons during the father's life-time. This is a most important question because, if the contention is right, the recent decision involves the overruling of what has long been treated in this and other High Courts as a settled rule of every day application, and it is therefore incumbent upon us to satisfy ourselves that this result is really involved in the recent decision.

Now there are two distinct and closely connected things, one, the father's power to bind the sons' shares by alienations during his life-time for debts not incurred for necessary purposes and not tainted with immorality, and the other, the creditor's remedies by suit in respect of such debts against the sons' shares; and this distinction is observed in the well-known

1. (1917) L. R. 44 I. A. 126.

passage of Lord Hobhouse's judgment in *Mussamut Nanomi Babufasin* v. *Modun Mohun* [1], which is quoted in the recent decision. That decision relates to the first question, *viz.*, whether the father's power of alienation to satisfy the class of debts already mentioned could only be exercised where the debt was antecedent or extended to alienations for present debts as well, and does not of itself affect the other question as to the extent of the creditor's remedies by suit against the sons' shares. It is said however that the reasoning of the judgment is inconsistent with the Indian rulings as to the creditors' remedies against the son during the father's life-time, and the passage on which most reliance is placed is as follows:—"While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing." Now it may be said that the reasoning in this passage applies equally whether the debt for which the alienation is made by the father is an antecedent debt or a present debt and that it involves a departure from the decisions in *Girdharee Lall* v. *Kantoo Lall* [2] *Suraj Bunsi Koer* v. *Sheo Proshad Singh* [3], *Mussamat Nanomi Babufasin* v. *Modun Mohun*, [1] and other decisions of their Lordships in which the father's right to alienate for antecedent debts was rested on the pious obligations of the sons to pay them. Their Lordships, however, considered that the rule as to alienations for an antecedent debt was too firmly established to be disturbed, and treated it as an exception from a general and sound principle not to be extended and to be very carefully guarded. They proceeded to say that much, if not all, the law upon the subject had arisen from the necessity of protecting the rights of third persons, say the purchasers of the property who have taken their title for onerous consideration and in good faith, and

1. (1885) L.R. 13 I.A. 1=I. L. R. 13 C. 21. 2. (1874) L.R. 1 I. A. 321.
3. (1879) L. R. 6, I. A. 88=I. L. R. 5 C. 148.

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quoted with approval a passage from the judgment of Sir John Stanley, C.J. which thus interpreted the observations in *Suraj Bunsi Koer* v. *Sheo Proshad Singh* [1]. They then set out the well-known passage from Lord Hobhouse's judgment in *Mussammat Nanomi Babuasin* v. *Modun Mohun*, [2] which contains the express statement that the sons cannot set up their rights against the remedies of the creditors for debts not tainted with immorality and observed that it lent no countenance to the idea that the joint family estate could be effectively sold or charged except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. It is important to note that their Lordships, perhaps advisedly, did not say here that the joint family estate cannot be sold by the Court in satisfaction of an antecedent debt, or comment on the very general words as to the extent of the creditor's remedies to which so much importance has been attached by all the Courts in India. They then observed that they had set forth the limits to the exception because they formed a guide to the settlement of the conflict of authority in India on the subject of antecedent debt; and after mentioning the cases in which the conflict arose they again adopted as the true rule the statement of Sir John Stanley as to alienation by the father for an antecedent debt.

There is no reference to the subject of the creditor's right by suit to bring the son's interest to sale for an antecedent debt, or to the Indian decisions affirming that right; and the question is whether these decisions which proceed upon the authority of their Lordships' earlier decisions should now be overruled because, it is said, the reasoning in the recent judgment is in favour of allowing the sons to resist a sale of their shares. As to this, Lord Halsbury's well-known observations in *Quinn* v. *Leathem* [3], that a case is only an authority for what it decides, and not for every proposition that may seem to follow logically from, it appears to me to apply with special force. That the Indian Courts have interpreted the earlier decisions ending with *Mussamat Nanomi Babufasin* v. *Modun Mohun* [2], in which last case it is stated that the sons cannot set up their rights against his creditors' remedies for their

1. (1879) L. R. 6 I. A. 88, page 101. 2. (1885) L. R. 13 I. A. 1.
3. (1901) A.C. 495, 506.

debts if not tainted with immorality, as authorising suits for such debts against the son as well as father may be seen, as regards Calcutta, from the Full Bench decision in *Luchmun Dass* v. *Giridhur Chowdhry* [1] and the judgment of Mookerjee and Holmwood, JJ., in *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* [2] where the other decisions are dealt with. The point was expressly decided in *Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas* [3], after the decision in *Mussamat Nanomi Babuasin* v. *Madun Mohun*[4] and that decision is followed in *Umed Hathising* v. *Goman Bhaiji* [5]. In Allahabad there is an express decision of a Full Bench in *Karan Singh* v. *Bhup Singh* [6] and this decision to which Sir John Stanley, C.J., was a party was referred to by him in his judgment in *Chandra Deo Singh* v. *Mata Prasad* [7] which is repeatedly referred to with approval by their Lordships in the recent case.

As regards our own Court, the case is, if anything stronger, because it has expressly based the creditor's right to bring to sale the sons' shares for an antecedent debt on the father's right to sell the sons' shares for such a debt, a right which is expressly recognized. In the leading case in *Ponnappa Pillai* v. *Pappuvayyangar*, [8] which overruled the earlier decisions of this Court in deference to *Girdhari Lal* v. *Kantoo Lal* [9] and *Suraj Bunsi Koer* v. *Sheo Prasad Singh*[10], Sir Charles Turner, C. J., in a judgment approved by the Privy Council in *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar*[11] observed at page 64 that when it is decided that for the discharge of debts other than debts incurred for immoral purposes, a father can make a valid alienation of ancestral property so as to bind his son's interest, it is a corollary that the interest of the sons as well as of the father may be attached and sold in execution for such a debt. Again in the Full Bench decision in *Ramasami Nadan* v. *Ulaganatha Goundan*[12] which has been treated till now as finally settling the question in this Presidency, Shephard, O.C.J., observed at page 61 "since 1874, the decisions of the Judicial Committee are consistent in holding that as the sons' liability may be enforced through

1. (1880) I.L.R. 5 C. 855.
2. (1907) I L. R. 34 Cal. 735.
3. (1886) I L. R. 11 Bom. 37.
4. (1885) L. R. 13 I. A. 1.
5. (1895) I.L.R. 20 Bom. 385.
6. (1904) I. L. R. 27 All. 16.
7. (1909) I. L. R. 31 All. 176
8. (1881) I. L. R. 4 Mad. 1.
9. (1874) L.R 1 I. A. 321.
10. (1879) L.R. 6 I.A 88=I.L.R. 5 C. 148.
11. (1882) L. R. 9 I. A. 128=I. L. R. 6 M. 1.
12. (1898) I. L. R. 22 Mad 49=8 M. L. J. 312.

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the medium of a sale of the ancestral property executed by the father; so it may be enforced by a sale in execution of a decree against the father and that in neither case can the son recover the property except by proving that the debts were of a kind for which he would not be liable." Benson, J., also proceeded on the authority of the Privy Council decisions. Subramania Aiyar, J., went somewhat further, and held in an elaborate judgment that under Hindu Law, a son was liable for his father's debts even in the latter's lifetime, a conclusion which is perhaps hardly reconcilable with the recent decision of their Lordships. This Court has adhered to the view of Turner, C. J., and has held in a series of cases that, as the effect of partition is to put an end to the father's right to sell the son's share for an antecedent debt, it also puts an end to the creditor's right to bring the son's share to sale during his life-time, at any rate where the partition has not been effected to defeat and delay creditors. *Krishnasami Konan* v. *Ramasami Ayyar* [1], *Rathna Naidu* v. *Aiyanchariar* [2], and *Kameswaramma* v. *Venkatasubba Row* [3].

In these circumstances, and as it appears to me that the creditor's right to bring the sons' shares to sale for an antecedent debt and the long line of decisions which support it were not considered by their Lordship in the recent case, I think it should not be treated as overruling them, and that, if we are to depart from what has been the settled law of this and other High Courts for so many years, it should be in deference to a clear expression of their Lordships' opinion with reference to this particular question and not any inference from the reasons given by Their Lordships in settling a conflict in the Indian Courts on another point.

While we overrule Mr. Parthasarathi's first contention, he is entitled, as appears from what I have already said, to succeed on the ground that the suit was filed by the creditor after partition, to say nothing of the further ground that the father had no authority from the son to renew the note after partition. The appeal is allowed, and the decree of the District Munsif restored with costs here and in the Lower Appellate Court.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J.:—I have had the advantage of reading the judgment of my Lord and agree in holding that the Second Appeal should be allowed not on the broad question raised by Mr.

1. (1899) I.L.R. 22 M. 519=9 M.L.J. 127. 2. (1908) 18 M. L. J. 599.
3. (1914) I.L.R. 38 M. 1120 at 1120=27 M.L. J. 112.

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Parthasarathy Aiyangar as to the non-liability of a son to pay his father's debts during the father's life-time, a conclusion which according to appellant's counsel is the logical result of the recent decision of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* [1] but on the narrower one that a son is not after partition liable to be proceeded against in respect of a simple personal debt incurred by the father before partition whatever his rights may have been if they had continued joint.

It has been contended by Mr. Krishnaswami Aiyar that the pious duty which lay on the son to discharge his father's debts is under Hindu law irrespective of the possession of any assets or joint family properties and that consequently it is unaffected by any partition and attaches so long at least as there is any property which was once joint property in existence in the son's hands, the change in the character of the property created by the partition being unaffected by an obligation which arose irrespective of the possession of any assets.

Whatever may be the strict rule of Hindu Law as to the extent of the pious obligation it has been now well settled that it is circumscribed by the possession of assets or joint family property and that it does not attach to the son's self-acquisitions. So far as the creditor of the father is concerned all that he can do is to avail himself of any remedy that may be open to the father and work it out either by suit or in execution proceedings and if the father has lost his power of dealing with the son's interests owing to a *bona fide* partition between them, the creditor can be in no better position. The effect of a *bona fide* partition is *prima facie* to secure to each of the parties absolute control over the properties that fall to his share unfettered by any liabilities which at the date are not charged upon them. The personal debts of each member are payable only out of his share and the transaction is one in the nature of a conveyance by one party to the other of the property that falls to him. There is nothing in Hindu Law to prevent a father from taking certain properties absolutely or receiving certain benefits and releasing the son from the duty cast upon him by Hindu Law to pay his debts and so long as the transaction is *bona fide* a simple creditor can have no right to object to a transaction which both the father and son were competent to enter into.

1. (1917) L. R. 44 I. A. 126=33 M. L. J. 14.

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In *Krishnasami Konan* v. *Ramasami Ayyar*, [1] it was held that after a *bona fide* partition between a father and son it was not open to the creditor at least during the father's life-time to proceed in execution against the son's share in respect of a decree obtained against the father. In *Rathna Naidu* v. *Aiyanachariar*, [2] it was held following the above case that a Hindu father has no power to mortgage the share got by the son on partition even though the mortgage was in respect of a debt that was contracted before partition. In *Kameswaramma* v. *Venkata Subba Row*, [3]. Wallis, C. J., after reviewing the authorities followed the decision in *Krishnasami Konan* v. *Ramasami Ayyar*, [1] and held that a creditor had no right to proceed against the son's properties. With reference to *Ramachandra Padayachi* v. *Kondayya Chetti*, [4] cited by the respondent's vakil it is distinguishable as the debt sued on arose of a joint family business carried on by the father and son before partition and the liability of the son rested not merely in his pious obligation to pay a debt incurred without any family necessity or for the family benefit but on contract, every member being liable on the contract entered into in respect of a joint family trade at least to the extent of the joint family assets as the profits of the trade would in the ordinary course be shared by all the members.

In the case of renewal by the father alone after partition of a note executed before partition the case is much stronger as I can see no equity in allowing a Hindu father to renew and keep alive a debt (increased by the addition of interest and principal at each renewal) so as to throw upon the son the duty of paying it out of properties that fall to his share. The renewed note must in my opinion be treated as a new obligation incurred after partition. It has been argued that in the present case the creditor took the note without notice of the partition. I do not think this will make any difference so far as the son's rights are concerned. The pious duty creates no charge on the son's share prior to partition, the presumed agency of the father ceases on partition and as the creditor can only work out the father's rights at the date of the suit he can have no right if that right is lost owing to a *bona fide* partition.

Turning to the broader question raised I do not think that we can in effect overrule a series of decisions and disturb the

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1. (1899) I. L. R. 22 Mad. 519. 2. (1908) 18 M. L. J. 599.
3. (1914) I.L.R. 38 M. 1120. 4. (1901) I.L.R. 24 M 555=11 M.L.J. 346

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settled state of the law mainly based on the previous decisions of the Privy Council without some more definite pronouncement of their Lordships in a case in which the question is directly raised.

In *Sahu Ram Chandra* v. *Bhup Singh* [1] their Lordships of the Privy Council while upholding the father's power of alienation either by an absoulte sale or a mortgage of joint property *in order to satisfy an antecedent debt* meet the contention that so long as there is a pious duty the distinction between antecedent and contemporaneous debts is immaterial with the following remarks:—"While the father, however, remains in life, the attempt to affect the sons' and grand-sons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, must fail; and the simplest of all reasons may be assigned for this, namely that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged." It has been argued that this involves two propositions namely (1) that the pious obligation does not arise till the death of the father and (2) that it is only enforceable to the extent of the portion of the debt which cannot be met out of the share or assets of the father. Pushed to its logical conclusion the observations above cited do no doubt, while preserving (1) to the father the right to deal with his son's shares by sale or mortgage so long as it is for the purpose of discharging an antecedent debt (2) to a mortgagee for an antecedent debt the right to proceed against the son's share and (3) to a purchaser to whom property is sold to satisfy an antecedent debt the right over the entire property including the son's share, negative the right of a simple creditor or a transferee not for an antecedent debt to proceed against the son's share during the lifetime of the father or in other words subordinates the rights of the creditor of the father whose debt is not for the family benefit to the Mitakshara rights of the sons in respect of their undivided share and puts him *qua* such debts in the same position as if he was the creditor of any other member of a joint Mitakshara family. The result is to overrule a series of decisions referred by the Chief Justice in his Judgment of this and the other High Courts extending over several years and to restore the state of the

1. (1917) L. R. 44 I. A. 126=33 M. L. J. 14.

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law in this Presidency to what it was before the Full Bench decision in *Ponnappa Pillai* v. *Pappuvayyangar* [1].

I do not think that we can do this without a further pronouncement by their Lordships as to the effect of their observations on the cases relating to the creditor's remedies during the lifetime of the father.

It has been settled by a series of decisions commencing from *Ponnappa Pillai* v. *Pappuvayyangar* [1] on the authority of the decisions of the Privy Council in *Girdhare Lal* v. *Kantoo Lal* [2] and *Mussamat Nanomi Babuasin* v. *Modun Mohun* [3] that a creditor of the father whose debt has not been incurred for an illegal or immoral purpose can in execution of his decree against the father bring to sale the interest both of the father and his son in joint family property and that it is open to the creditor to join the father and his sons in a suit and obtain a decree declaring the liability of the interests of the sons in the joint property to satisfy the debt, the only defence open to the sons being that the debt was contracted for illegal or immoral purposes. The *ratio decidendi* was that as the father had power to dispose of his son's share to satisfy a debt neither illegal nor immoral the creditor had the right to sell in execution what the father could have done by alienations *inter vivos*. Nothing can be clear than the observation in *Mussamat Namomi Babuasin* v. *Modun Mohun* [3] to the effect that the sons cannot set up their rights against the creditor's remedies for their father's debts if not tainted with immorality.

While the decisions recognised alienations for antecedent debts on a different category and denied the power of the father to sell or mortgage joint family properties except for an antecedent debt and excluded the loan secured by a mortgage or the purchase money got from the vendee from the category of antecedent debts, the result of the ruling of the Privy Council in *Nanomi Babuasin's* [3] case as understood by all the Courts was simply to alter the form of the creditor's remedy. He was entitled to treat the balance due on his mortgage after selling the father's share as a simple debt due by the father and so liable to be paid by the sons by reason of their pious duty. It was similarly open to him in cases of sales to sue the father as for failure of consideration in case the sons succeeded on getting their share excluded from

1. (1881) I. L. R. 4 M. 1. 2. (1874) L. R. 1 I. A. 321.
3. (1885) L. R. 13 I. A. 1.

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liability and to proceed against the sons for the damages payable by their father who sold more than he was entitled to.

In the case of simple debts or suits on the personal covenant to pay by the father in mortgages the sons were held to have no defence to the suit unless they showed that the debt was illegal or immoral, no question of antecedent debt arising on a suit to recover a simple debt. The following observations in *Surjaprasad* v. *Golab Chand* [1] where the debt secured was on the one hand not antecedent and on the other not illegal or immoral indicate the position of the parties in such cases :—" The plaintiff seeks to enforce the mortgage security in this case, and he is bound to show that the mortgage is binding upon the defendant. Having regard to the rulings both of the Privy Council and this Court, he could do so by showing that the debts for which the mortgage was given were "antecedent debts " that is to say, antecedent to the transaction in question, but we are unable to find upon the evidence such as it is that this was so. If then the mortgage is not binding upon the defendant, the question is whether the plaintiff is entitled to a decree declaring that the money covered by the bond may be realised out of the whole of the ancestral estate, the debt not being proved to have been incurred for immoral or illegal purposes, and it being antecedent to the suit. If the plaintiff had brought his suit within six years from the time when the bond fell due, there could be no doubt that he would be entitled to the relief which was declared as the proper relief to be granted to a party in the position of the plaintiff in the case of *Luchmun Dass* v. *Giridhur Chowdhry* [2] decided by a Full Bench of this Court and in the case of *Khalilul Rahman* v. *Gobind Pershad* [3]." These observations have to be borne in mind when we have to consider the remark of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* [4], to the effect "that except under the mortgage all other remedies have long ago disappeared."

In *Sahu Ram Chandra* v. *Bhup Singh*[4] the question directly before their Lordships was whether a mortgage for an antecedent debt was binding on the sons and this question was answered in the affirmative and so far the decision confirmed the view taken in all the High Courts. The decision in *Mussamut Nanomi Babuasin* v. *Modun Mohun* [5], which has been treated by Courts in India as

1. (1900) I. L. R. 27 C. 762.
2. (1880) I. L. R. 5 C. 855.
3. (1892) I. L. R. 20 C. 388.
4. (1917) L. R. 44 I. A. 126.
5. (1885) L. R. 1 3I A. 1.

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the basis for allowing the creditor to sue the sons in their father's lifetime for their father's debt on the ground that he was entitled to do by suit and execution proceedings thereunder what the father could have done of his own volition though referred to by their Lordships as establishing the son's liability for mortgages or alienations created to pay off antecedent debts was not explained as being limited to such cases. So far as I can see the attention of their Lordships was not called to the remedies of a simple creditor as enunciated by the decisions of the various High Courts. The passages in the Hindu Texts and commentaries (which I shall refer to later on) which show that the pious obligation of the son was not purely a post mortem obligation but one which would under certain circumstances arise during the life of the father were not brought to the notice of their Lordships. The passage in their judgment to the effect that the case was free from complications because "except under the mortgage all other remedies have long ago disappeared, and the appellants rear it up and claim under it now, there being no right in them to invoke the doctrine of the pious obligation to discharge the debt incurred by *Bhup Singh*, because that debt as such cannot be successfully sued for" indicates that their Lordships had in view the cases where a suit on the debt evidenced by a mortgage not illegal or immoral would lie against the sons even though the mortgage was not for an antecedent debt. (*Surjaprasad* v. *Golab Chand* 1, and other cases). If there was no pious obligation at all during the father's life-time and the father was in the position of any other co-parcener it is difficult to see how any suit would lie against the sons except for debts incurred for necessary family purposes and it would be prefectly immaterial to the sons whether the debt is barred or not.

In *Sripat Singh* v. *Tagore* 2 where their Lordships had to consider the effect of a sale of joint family properties in execution of the decree obtained on a simple debt incurred by the father alone observe:—"The grounds for that action were these: The property in question was joint property, governed by the Mitakshara Law. By that law a judgment against the father of the family cannot be executed against the whole of the joint family property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In

1. (1900) I L.R. 27 C. 762. 2. (1917) L. R. 44 I. A. 1=32 M. L J. 133.

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every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone." They also observe that the creditor had the *undoubted right* to bring the property to sale except where the sons show that the debt was illegal or immoral.

While I am not prepared to hold that the decision in *Sahu Ramchandra* v. *Bhup Singh*, [1] must be taken to overrule by implication the whole current of authorities during the past 35 years and to restore the state of the law to what it was prior to the year 1881, I am of opinion that the decision makes it clear that it is the primary duty of the father to pay debts incurred by him not for any family necessity but for his own purposes and that the pious duty of the son only arises when the assets of the father are insufficient assuming that it arises at all during the life time of the father. In other words the pious duty is limited to the debts which the father is unable to satisfy out of his share or his self-acquired properties. This limitation introduced by the Privy Council is, if I may say so with respect, entirely in accordance with Hindu Smrithis and safeguards the spiritual interest of the father and the temporal interests of his sons. According to the notions of Smriti writers it is regarded as sinful to remain in debt and a debtor's salvation is deeply imperilled if he dies indebted. According to Vrihaspati a person who does not repay his debt "will be born in his creditor's house as a slave or servant or woman or a quadruped." According to other writers a person dying in debt goes to hell. A duty is therefore cast upon every person to discharge debts incurred by him. The liability of the son to come to the help of his father is only stated to arise when the father is owing to misfortune unable to pay his debts. Yagnavalkya says "if a father has gone abroad or died or been subdued by calamity his debts shall be paid by his sons and grandsons, on their denial the creditor must prove the debt by witnesses." Chapter 2 Sloka 51. Vigneswara in the Mitakshara commenting on the sloka observes "if the father not having paid the debt due has died or has gone to a distant country or is overpowered by incurable disease et-cetera, then the debts contracted by him must be paid by his son or grandson even in the absence of the father's property. Thereon this is the order—on the

1. (1917) L. R. 44 I. A. 126.

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father's default it is the son, on the son's default it is the grandson (who should pay).. Therefore by a son born giving up his self-interest should the father be carefully released from debt so that he may not go to hell. In the Smriti Chandrika reference is made to the Sloka of Katyayana to the effect that "even though the father be living if he is afflicted by disease or has gone to sojourn away from his own country the debt contracted by the father should be paid by the sons after the 20th year" and so the text of Vrishaspathi that "even when the father is alive if he be afflicted with disease such as consumption, leprosy or if he be born a blind person then the sons should pay the debt when it has been proved." The law givers while casting on the son to pay the debts which the father was owing to misfortune unable to pay also enjoin the father not to get into debt as he thereby becomes "an enemy to his son." It is clear that whatever may be the pious duty of the son after the father's death the duty in the father's life-time is only to pay if the father is unable to do so.

To this extent I think Courts can safely safeguard the interests of the sons in respect of a liability based simply on their pious duty. Any further extension of the immunity of the son cannot, I think be made in the state of the authorities as they stand at present. Till the decision in *Girdhari Lall* v. *Kanto Lal*[1] the view taken by Courts in this Presidency was that the son was not during his father's lifetime liable under any circumstances to pay his father's personal debts. The contrary view has been taken since 1881 when the majority of the Judges in the Full Bench in *Ponnappa Pillai* v. *Pappuvayyangar*[2] followed what they thought to be the obvious result of the decision in *Girdhari Lal's* case. I think a clear pronouncement of their Lordships of the Privy Council reversing the whole current of decisions of all the High Courts and restoring the state of the law as it stood before the decision in *Girdhari Lal's* case is necessary before we can push certain observations of their Lordships in *Sahu Ram's* case to what it is contended is their logical conclusion.

The power given to a creditor to work out the rights which a Hindu father has to require his son to pay his debts has its foundation not on any Hindu Law texts (attachment and sale in execution of decrees being un-known to the text writers) but on principles of modern jurisprudence. The question in

1. (1874) L. R. 1 I. A. 321. 2. (1881) I. L R. 4 M. 1.

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these cases is (to quote the words of *Sir James Colville* in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* [1] "not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences, as to what are the limits of an exceptional doctrine established by modern jurisprudence."

I agree that the appeal should be allowed with costs in this and the lower Courts.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, THE CHIEF JUSTICE AND MR. JUSTICE OLDFIELD.

V. Krishnayyah ... *Appellant* * (*Defendant*)

v.

C. Gajendra Naidu and others ... *Respondents* (*Plaintiffs*).

Krishnayyah v. Gajendra Naidu.

Limitation Act, Art. 183—Original Side decree—"Revivor"—Doctrine of—Origin—Order of "revivor" under S. 248 of the Civil Procedure Code of 1882 against one defendant—Effect on other defendant to whom no notice went —Provisions of Arts. 182, 183 and of Limitation Act on the point compared.

As regards the revivor of Original Side decrees notice must go to the parties against whom it is sought to revive the decree. *Held*, therefore that an order of revivor of a decree on the Original Side made against one of the defendants under S. 248 of the old Code was inoperative as against another defendant to whom no notice went.

Observations on the origin of the doctrine of "revivor".

Provisions of Arts. 182 and 183 of the Limitation Act on the point compared.

On appeal from the judgment of the Honourable Mr. Justice Bakewell dated 9th November 1915 passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 203 of 1899.

The Judgment of Mr. Justice Bakewell is as follows:—By a decree of this court dated 20th February 1900 the two defendants in the suit were ordered to pay to the plaintiffs the sum of Rs. 10,938-11-6 and interest thereon and costs. On the 24th February 1903 one of the plaintiffs in the suit presented an application for execution of this decree which prayed that notice under S. 248 of the Code of Civil Procedure might issue to the 1st defendant to appear and show cause why execution of the decree should not issue and for attachment of a decree in another suit awarding costs to the 1st defendant. Notice was issued accordingly to the 1st defendant and on the 3rd March 1903 an order was made granting leave to execute as prayed.

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* O. S. No. 93 of 1915. 20th March 1917.

1 (1880) L. R. 7 I. A. 181 at p. 195=I. L. R. 5 B 48.

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On the 25th February 1914 the transferee from the same plaintiff presented this application for execution of the decree which states that the last order in execution is that of 3rd March 1903 and prays that the name of the transferee may be brought on record and leave to execute the decree against the 2nd defendant be granted to him, and that notice may issue to the defendants. The 2nd defendant appears upon notice issued on this application and objects that the application is barred by limitation by virtue of Art. 183 of the Limitation Act, 1908. This article prescribes 12 years for an application to enforce a decree of a High Court in the exercise of its ordinary Original Civil Jurisdiction and provides that when the decree has been revived the 12 years shall be computed from the date of such revivor.

The English law is stated by Blackstone in the following passage :—"Writs of execution must be sued out within a year and a day after the judgment is entered ; otherwise the court concludes *prima facie* that the judgment is satisfied and extinct ; yet however, it will grant a writ of *scire facias* in pursuance of statute Westm. 2-13 Edw. 1, c. 45 for the defendant to show cause why the judgment should not be revived and execution had against him ; to which the defendant may plead such matter as he has to allege in order to show why process of execution should not be issued or the plaintiff may still bring an action of debt founded on this dormant judgment which was the only method of revival allowed by the common law." (Commentaries, 15th Edn., Volume 3, page 421.) The writ recited the judgment and any change in the parties and commanded the Sheriff to make known to the defendant or other person named in the writ that he should appear before the court on a special date, to show cause why the plaintiff should not have execution of the judgment (Freeman on Executions, Volume I, pages 323 and 324.) The form of notice under Order XXI R. 22 of the Code which corresponds with S. 248 of the Code of 1882 contains substantially the same particulars (Appendix E. Form No. 7) and it has been held that the procedure under this section has taken the place of the former procedure by writ of *scire facias* in the Supreme court and that an order for execution after notice effects a revivor of a decree within the meaning of Art. 183 : See *Dassoo Venkateswar Perumal Chetty* v. *Srinivasa Ranga Row* [1]. Where there had been a change of parties subsequent to the judgment as in the case of the death of the judgment creditor, a writ of *scire facias* was necessary even within a year of the judgment and it was held that a judgment in *scire facias* conferred a new right upon the executors. *Farren* v. *Bereford* [2] and *Farrell* v. *Gleeson* [3] Whether the judgment in *scire facias* conferred a new right when there had been no change of parties seems doubtful. *Farren* v. *Berrerford* ; but the writ should conform to the original judgment and should therefore be joint when the judgment is joint and the latter should be revived against all the original defendants. (Freeman on Executions, Volume I, page 313). The procedure upon the writ therefore followed that in the action of debt against joint debtors in which all should be joined and judgment against one extinguished the claim against another joint debtor : *King* v. *Hoare* [4].

From the passage from Blackstone cited above it appears that a judgment creditor had concurrent remedies by the writ of *scire facias* and the action of debt, and it is improbable that the judgments would have different effects.

The order of revivor in the present cases was made without notice to one defendant and he had therefore no opportunity of appearing and objecting thereto and it has no effect against him or his property except that if that were carried out

1. (1910) I. L. R. 33 M. 187.
2. (1843) 10 Cl & F. 319 at 334.
3. (1844) 10 Cl. & F. 702.
4. (1844) 13 M. & W. 494.

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his co-debtor might obtain a right of contribution as against him. It seems to me that an *exparte* order of this kind should not be held to affect the position of the second defendant in the absence of any direct authority.

In other courts where the prescribed period of limitation is very much less than in this court an application for execution made against one of several joint debtors takes effect against them all (article 182); but there is no such provision for cases in which notice of the application is required. The fact that the legislature has expressly provided for one case of joint debtors and has omitted to make the same provision for another case appears to me to show an intention to place the two cases on a different footing.

For these reasons I hold that the previous order in execution against the 1st defendant did not revive the decree as against the second defendant, and I dismiss his application with taxed costs

Venkatasubba Rao and *Radhakrishnaiya* for Appellant.

K. Ramachandran and *T. S. Narayana Sastri* for Respondents.

The Court delivered the following

Judgment:—This appeal raises an interesting point as to which Mr. Venkatasubba Row has candidly put the authorities before us. The question is whether Mr. Justice Bakewell was right in holding that an order of revivor of a decree on the Original Side made against the first defendant under Sec. 248 of the old Code was inoperative as against the 2nd defendant to whom no notice went. The word 'revivor' in the third column of Art. 183 as is well known, refers to the common law practice which prevailed in Supreme Courts in India under which, if a writ of execution was not sued out within a year and a day, it was necessary to revive the decree by a process known as *scire facias* or more fully *scire facias quare executionem not habeat* that is to say by calling on the judgment-debtor to show cause why the plaintiff should not have execution against him. When the Code of Civil Procedure came to be enacted, the rule was embodied in what was S. 248 of the old Code and now O. XXI, R. 22 under which when an application for execution is made more than one year after the date of the decree, notice is to go to the persons against whom execution is prayed requiring him to show cause on a day to be fixed why the decree should not be executed against him. This rule requires notice to go against the person against whom execution is applied for, and the Sub-section 6 of the third column of Art. 182 of the Limitation Act provides that when such notice has been issued, the date of issue of notice to the person against whom the execution is applied for to show cause why the decree should not be executed against him is to form a fresh starting point.

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We think both on the reason of the thing and on the analogy of the provisions of the Code which apply the doctrine of revivor to India that as regards the revivor of Original Side decrees notice must go to the parties against whom it is sought to revive the decree. The whole doctrine, as is explained in the passage from Blackstone cited in Mr. Justice Bakewell's judgment, had its origin in the presumption of satisfaction which was held to arise when execution had not been applied for within a year after the date of the judgment. As regards Art. 182, Expl. 1 in the third column provides that where the decree or order has been passed severally against more persons than one, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all. This however only applies to applications under Art. 182 which, however in terms excludes applications such as the present provided for by Art. 183. The explanation refers only to applications under Art. 182 and has nothing to do with the revivor of Original Side decrees.

For these reasons we think that the judgment of Mr. Justice Bakewell is right and that the appeal must be dismissed with costs of the 1st respondent.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE SRINIVASA AIYANGAR.

Senakkayala Virasami Naidu ... *Appellant* (5th Defendant).*

v.

Bommadevara Pichayya Naidu and others ... *Respondents (Plaintiffs. and Defendants 1 to 3.)*

Senakkayala Virasami Naidu v. Bommadevara Pichayya Naidu.

Hindu Law—Widow—Gift of entire property to daughter and daughter's son not binding on the reversion.

It is not competent to a Hindu widow to divide the entire property of her husband among her daughters and daughter's children, so as to bind the reversioner. The fact that portions of the estate are given away at different times cannot validate such a disposition.

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* A. S. Nos. 207 and 213 of 1915. 25th January 1917.

Ramasami Aiyer v. *Vengidusami Iyer* [1]; *Kudutamma* v. *Narasimha Charyalu* [2], *Anivillah Sundararamaya* v. *Cherla Seethamma* [3], *distinguished.*

Sankkayala Virasami Naidu v. Bommadevara Pichayya Naidu.

Appeal against the decree of the court of the Temporary Subordinate Judge of Guntur in O. S. No. 55 of 1913.

T. V. Venkatarama Aiyar for Appellant.

P. Narayanamurthi for Respondent.

The Court delivered the following

Judgment:—*A. S. No. 207 of 1915.* The first question argued before us in this appeal is whether the plaintiffs are the reversioners of the last male owner of the properties of one B. Perumallu, the son of the 2nd defendant who is the widow of one Naganna. We do not think that the matter admits of any reasonable doubt. * * * *

[Their Lordships after considering the evidence agreed with the conclusion of the Lower Court that the plaintiffs were the reversioners.]

The next point that has been very strenuously argued before us is that the gift made to the 3rd defendant by the widow, the 2nd defendant, of one-fourth of the family property is valid. We agree with the Subordinate Judge that the gift cannot be supported. What the 2nd defendant did was, she gave half the estate of her husband first of all to her daughter the 4th defendant and then one-fourth of the estate to the 3rd defendant and the remainder to the 3rd defendant's son the 5th defendant. That is to say, she took it upon herself to divide the entire property among her daughters and the daughter's son. That is not a sort of disposition by a widow which can be sustained under the Hindu Law, and we do not think that any of the cases which have been cited lends support to a claim of this nature. In the case in *Ramaswami Iyer* v. *Vengidusami Aiyar* [1], the gift was made on the occasion of marriage. Here the finding of the Subordinate Judge is that it was not proved that there was, as suggested, an oral gift at the time of the marriage supplemented by the execution of proper documents sometime afterwards. In the case in *Kudutamma* v. *Narasimhacharyulu* [2], the gift in favour of a daughter of the family, was made by the manager. It was found that it was a reasonable gift having regard to the circumstances of that case. The main circumstances as mentioned there were that the family owned very

1. (1898) I. L. R. 22 M. 113=8 M. L. J. 170. 2. (1907) 17 M. L. J. 528.
3. (1911) 21 M. L. J. 695.

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large family properties and that apparently a very small portion of the property was given to the daughter. Similarly in *Anivillah Sundararamayya* v. *Cherla Seethamma* [1], what was given was only 8 acres of land belonging to a very wealthy family the possessions of which consisted of more than about 200 acres of land. No doubt that gift was made some years after the marriage, but the circumstances of that case were totally different from the circumstances of the present case. The next case which is relied upon is *Churaman Sahu* v. *Gopi Sahu* [2]. In that case, the gift appears to have been made on the occasion of the daughter's grihapravesam ceremony, a ceremony connected with marriage and it was especially on that ground that the validity of the gift was upheld. We do not think that any of these cases can support the proposition that a widow is entitled to divide the entire property of her husband among her daughters and daughter's children or that the fact that portions of the estate are given away at different times can validate such a disposition. This appeal is dismissed with costs.

A. S. No. 213 of 1915. All that is stated in the plaint in the suit in which the appeal arises, is that the widow, the 2nd defendant, has caused transfer of pattahs in the name of the 4th defendant with respect to a portion of the land in dispute in this suit. There is no allegation that there had been an alienation by means of a conveyance and that alienation was to be set aside though as a matter of fact a deed of gift had been executed in favour of the 4th defendant. Nor was there any issue raised as regards the validity of the deed in favour of the 4th defendant. The 6th issue refers only to the transfer of pattahs. That being so, there is no reason to differ from the conclusions of the Subordinate Judge. Then as regards items Nos. 20 to 22, the findings of the Subordinate Judge must be upheld. The appeal (No. 213 of 1915) will be dismissed with costs.

A. V. V.

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1. (1911) 21 M. L. J. 695. 2. (1909) I. L. R. 37 C 1.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR.

P. R. Srinivasa Aiyangar ... *Petitioner* in both (Defendant).*

v.

M. D. Narayana Aiyangar ... *Respondent in both (Plaintiff.)*

Srinivasa Aiyangar v. Narayana Aiyangar

Small Cause Court, Madras—Foreign decree—Execution—Jurisdiction—Judge of Small Cause Court, Madras, and Registrar of that Court—Powers of—Execution application—Dismissal for default of prosecution—Fresh application within a year of prior one—Order for arrest of judgment-debtor—Legality—Failure to give notice to him—Failure to record reasons for arrest without notice—Effect—C. P. C., S. 115—Revision—Interference in—Grounds—Order to be revised manifestly illegal—Petition without merits—Effect.

The Registrar of the Presidency Court of Small Causes, Madras, has no power to execute the decree of a foreign Court. Such a decree may however be put in motion by a Judge of that Court.

Where an application made in November 1915 to the Registrar of the Small Causes Court, Madras, for execution of a decree of the Court of the District Munsif of Mysore was dismissed for default of prosecution and on an application presented for the same purpose in December of the same year, the Registrar ordered the arrest of the judgment-debtor without previously giving notice to him and without recording reasons for holding that it was absolutely necessary in the interests of justice that his arrest should be ordered at once.

Held, in revision under S. 115 of the Code, (1) that the Registrar had no jurisdiction to execute the decree, (2) that, in any event the Registrar acted illegally in ordering the arrest of the judgment-debtor without notice to him, and (3) that the High Court would not condone the manifest illegality and decline to interfere in revision on the ground that the petitioner, the judgment-debtor, had no merits.

Petition No. 718 of 1916 under S. 115 of Act V of 1908 and S. 15 of the Charter Act, praying the High Court to revise the order of the Court of the Court of Small Causes at Madras, dated 14th February, 1916 in O. S. No. 437 of 1906-7 on the file of the Court on the Principal District Munsif of Mysore.

Petition No. 993 of 1916 under S. 115 of Act V of 1908 and S. 15 of the Charter Act praying the High Court to revise the order of the Court of the Small Causes, Madras, dated 21st December, 1915 in E. P. No. 14377 of 1915 in O. S. No. 437 of 1906-07 on the file of the Court of the Principal District Munsif of Mysore.

K. V. L. Narasimham for Petitioner.

C. Venkatasubbaramiah for the Respondent.

The Court delivered the following

Judgment :—So far as I am able to see there are no merits in these cases. But I have to deal with the question of law

* C. R. P. No. 993 and 718 of 1916. 16th April, 1917.

Srinivasa Aiyangar v. Narayana Aiyangar.

which is one of considerable importance and argued before me; my conclusion is that the Registrar of the Court of Small Causes had no jurisdiction to order execution of the decree, and also that he acted illegally in the exercise of his jurisdiction by directing a warrant to issue without giving the petitioner previous notice of the application. The facts necessary for the disposal of these two petitions are these. A decree was obtained in the District Munsif's Court of Mysore in 1908. It was transferred for execution to the Small Cause Court, Madras in October 1915. As the decree holder did not take steps, his first application was dismissed in November 1915. A second application was presented on the 13th December 1915, and without notice to the petitioner, the arrest of the petitioner (judgment-debtor) was ordered on the 21st December 1915; thereupon he paid the amount of the decree into court and asked the Registrar to consider his order directing his arrest and also to pay him back the money which he had deposited. The Registrar refused the application and hence these petitions to this court. I may also say that on the refusal of the Registrar to reconsider his order, an application was made to the Full Bench of the Small Causes Court. The learned Judges who constituted the Bench held that they had no power to interfere with the order of the Registrar.

The first point argued by the learned counsel for the petitioner is that the Presidency Small Cause Court has no jurisdiction to entertain applications for the execution of the decrees passed by a foreign court, and still less the Registrar of that Court. As regards the first of these contentions, I am unable to accept it. Under S. 44, Civil Procedure Code, the decrees passed by the Courts of a Native Prince or State in alliance with His Majesty may be executed in British India as if they had been passed by the courts of British India. Under Order 21, Rule 4, if a decree is passed outside the ordinary Original Civil Jurisdiction of the High Court, the execution of that decree within the City of Madras must be by the Presidency Court of Small Causes. It was argued before me that that provision applies only to the decrees of British Courts. But the language of S. 44 makes it clear that no distinction is drawn in this respect between the decree of British Courts and the decrees of foreign courts. My attention was drawn to S. 8 of the Civil Procedure Code and it was contended that as S. 44 of the Code is not included among the provisions made

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applicable to the Presidency Small Cause Court, that court has no jurisdiction to receive applications for execution from foreign courts. S. 8 is intended to be supplementary to the rules of procedure provided by the Small Cause Court Act and the rules framed thereunder. S. 8 does not prescribe by implication the entertainment of applications for execution in respect of the decrees of Foreign Courts by the Small Cause Court. I am, therefore, of opinion that if the decree had been put in motion by a Judge of the Presidency Small Cause Court, there could have been no objection to its execution. I have, however, reluctantly come to the conclusion that the Registrar has no power to issue processes in execution of a foreign decree. He is not ordinarily a court. He is invested with the powers of a court only for certain purposes and unless either under the sections of the Small Cause Courts Act or under the rules framed under those sections, the power to execute the decree of a foreign court can be spelled out, I must hold that the Registrar of the Small Cause Court has no jurisdiction to execute the decrees. S. 35 of the Presidency Small Cause Courts Act speaks of the execution of decrees passed by the Court of Small Causes and not by the Courts of Native States in alliance with His Majesty. Under Order 12, only certain Judicial powers are delegated to the Registrar and the power to execute the decrees of foreign courts is not among them. S. 13 gives the Registrar the power to do certain ministerial acte and the power to direct the arrest of a judgment-debtor in execution cannot be regarded as a ministerial act. Consequently, the Registrar of the Small Cause Court has no power to execute the decree of a foreign court. The learned Vakil who appeared for the Counter Petitioner, suggested that the moment the decree was sent from Mysore to the Presidency Small Cause Court, it must be deemed to have become the decree of the Presidency Small Cause Court and that S. 35 of the Presidency Small Cause Courts Act applies. I am unable to agree with him. The decree that is transmitted for execution does not become the decree of the court to which it is transmitted although its powers of execution are similar to the powers conferred on it in respect of the execution of its own decrees. I must therefore hold that the Registrar had no jurisdiction to execute the decree and that the warrant which he issued for the arrest of the petitioner was *ultra vires.*

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One other contention of the learned Vakil for the petitioner may also be mentioned and that is that the Registrar acted illegally in the exercise of the jurisdiction by directing a warrant to issue without giving notice to the petitioner. As I mentioned before, the first application was dismissed in November 1915. The present application was presented on the 13th December 1915 and on the 21st of that month, the order to arrest the petitioner was made. No notice was given to the petitioner on this application. Order 21, Rule 22 in its proviso to Sub-clause (1) says that no notice shall be necessary in consequence of more than one year having elapsed if the application is made within one year from the date of the last order against the party against whom execution is applied for. In this case, there was no order made against the judgment-debtor by the Registrar or the Court of Small Causes within a year of the 21st December 1915. Consequently, the operative portion of sub-clause 1 applies; and it was incumbent upon the Registrar to have issued the notice to the petitioner before directing his arrest. The learned Vakil for the counter-petitioner said that the order was competent under sub-clause 2, but that sub-clause requires that the Court should be satisfied that in the interests of justice an order should be made without notice to the other side. The Registrar has recorded no reasons for holding that it was absolutely necessary, in the interests of justice that the arrest of the petitioner should be ordered at once. My attention was drawn also to a case decided by Ayling and Srinivasa Aiyangar, JJ., where they held that if there are no merits, the court is not bound to interfere under section 115, Civil Procedure Code. But the order made by the Registrar goes to the very root of his jurisdiction; I am not prepared to condone the manifest illegality by saying that the petitioner had no merits. I must set aside his order; the money in deposit should be paid over to the petitioner. I make no order as to costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE KUMARASWAMI SASTRI.

Narayana Aiyar ... (*Appellant* in both Petitioner*).

v.

Singaravelu Vannian and others ... *Respondents* (*Respondents*).

Narayana Aiyar *v.* Singaravelu Vannian.

Mortgage decree for sale before New Code — Decree a combined one directing recovery of amount by sale of mortgaged property and decreeing payment of deficiency by defendant — Validity — Question if can be raised in execution proceedings—Separate decree or order under S. 90 of T. P. Act if necessary in such a case—Application to enforce claim for deficiency by execution—Grant of, after notice—Finality as regards executability of decree—Recovery of deficiency—Limitation for—Starting point—C. P. Code, S. 48, Effect.

Held, that a mortgage decree passed before the present Code of Civil Procedure came into force in the form of a combined decree directing the payment of a certain sum on or before a certain date and the sale of the mortgaged properties in default and also decreeing the payment by the defendant of any deficiency that might arise by reason of the sale proceeds being insufficient to satisfy the decree was irregular but that it was not open to the judgment-debtors to raise the question in execution proceedings.

Held further, that it was not necessary in such a case to obtain another separate decree or order under S. 90 of the Transfer of Property Act; that when, in such a case, an application to enforce the decree-holder's claim for the deficiency by execution was once filed and execution was ordered after notice to the judgment-debtors, the order was final and it could not be contended in subsequent execution proceedings that the decree was not executable owing to the want of a final decree, and that the 12 years period of limitation under S. 48, C. P. C. for recovery of the deficiency ran from the date when the remedy against the mortgaged properties was exhausted.

Appeals against the orders of the District Court of Tanjore in A. S. Nos. 559 of 1912 and 601 of 1913 preferred against the order of the Court of the District Munsif of Tanjore dated 27th April 1912 in O. P. No. 447 of 1912 (O. S. No. 414 of 1898) and that of the Court of the District Munsif of Trivadi dated 7th July 1913 (O. S. No. 166 of 1909 on the file of the Court of the District Munsif of Tanjore) respectively.

G. S. Ramachandra Aiyar for Appellant.

N. Rajagopalachariar for the Respondents.

The Court delivered the following

Judgment:—The decree sought to be executed is a mortgage decree passed before the present Code of Civil Procedure came into

* C. M. S. A. Nos. 53 of 1913 and 32 of 1914. 1st August 1917.

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force. It is in the form (then usual) of a combined decree directing the defendants to pay a certain sum on or before a certain date, directing a sale of the mortgaged properties in default of payment, and also decreeing that the defendant do pay any deficiency that might arise if the sale proceeds proved insufficient to satisfy the amount decreed with interest and costs.

The decree was passed on the 8th October 1898. The mortgaged properties were sold on the 12th January 1903 and the sale was confirmed on the 17th February 1903. As the sale proceeds were insufficient the decree-holder filed several applications in execution between 1903 and 1912. He filed an execution application in 1906 and execution was ordered after notice to the judgment-debtors. This order is final and it cannot be contended in subsequent execution proceedings that the decree was not executable owing to the want of a final decree. *Lakshmiammal* v. *Subramania Pillai* [1]. It was ultimately dismissed for default of the decree-holder's appearance. Subsequent applications were put in, the last of which was allowed by the District Munsif, who was of opinion that it was not barred by limitation. On appeal the District Judge took the contrary view and dismissed it as barred.

Though the decree was irregular having regard to the provisions of the Transfer of Property Act we do not think it is open to the judgment-debtors to raise the question in execution proceedings. *Raja of Kalahasti* v. *Varadachariar* [2], *Abbaki* v. *Krishnayya* [3] and *Dhinabandhu* v. *Masuda* [4] are clearly in point. As the decree specifically decreed that the defendants were to pay any deficiency that might arise, it was not necessary to obtain another separate decree or order under section 90 of the Transfer of Property Act. *Periasami Kone* v. *Muthiah Chettiar*.[5]

The only question that remains is whether execution of the decree is barred under the provisions of S. 48 of the Civil Procedure Code. It is clear that the remedies against the mortgaged properties were exhausted only in February 1903 when the sale of the mortgaged properties was confirmed by the Court. The decree-holder has therefore twelve years from that date to enforce his claim for the deficiency by execution. The recent Full Bench decision in *Iyyasami Aiyar* v. *Venkatachalla Mudali* [6], concludes

1. (1913) 14 M. L. J. 103.
2. 21 M. L. J 1036.
3. I. L. R. 32 M. 534.
4. 16 C. L. J. 313.
5. I. L. R. 38 M. 677.
6. (1916) 31 M. L. J. 513

the question as the view taken by the referring judges and the majority of the judges composing, the Full Bench, is that the 12 years period of limitation under S. 48, Civil Procedure Code for recovery of the deficiency runs from the date when the remedy against the mortgaged properties is exhausted. We do not think that the order of the District Munsif directing the decree-holder to apply formally for a decree absolute which was under the circumstances of the present case wholly unnecessary would render the previous execution applications useless for the purpose of saving limitation.

We reverse the order of the District Judge with costs in this and the Lower Court. In C. M. S. A. No. 32 of 1914 we set aside the order of the District Munsif and direct him to dispose of the application for payment according to law.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—Mr. JUSTICE ABDUR RAHIM AND Mr. JUSTICE NAPIER.

Aiyasami Aiyar ... *Appellant** (*Respondent*)

v.

Aiyasami Aiyar ... *Respondent* (*Petitioner*).

Criminal Procedure Code, S. 195—Penal Code, S. 199—Sanction for prosecution—Principles regulating the grant of—Reckless statements, not meant to mislead.

The petitioner, a pleader, obtained a decree and in support of his application to draw out of Court the amount of costs deposited by the defendant, filed an affidavit stating that the property which he gave as security under the direction of the Court, was not subject to an incumbrance in favour of V. When, however, an Amin was sent to make an inquiry and report on the sufficiency of the security, the petitioner admitted that he had made a mistake and that there was an incumbrance in favour of V. On an application for sanction to prosecute the petitioner the District Munsif held that, having regard to the position and character of the petitioner, the nature of the statement made by him and the fact that when the Amin was sent he admitted the mistake, this was not a fit case for prosecution under S. 199, I. P. C. and refused sanction. The District Judge reversed the order of the Munsif holding that since there was a *prima-facie* case of making a false statement, all the other circumstances must be left for consideration at the trial.

Held, that in the circumstances of the case, the order of the District Judge granting sanction should be set aside.

Per Abdur Rahim, J. :—When sanction is asked for, for the prosecution of a person for making a false statement in the course of a judicial proceeding or for

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* C. M. A, No. 331 of 1916. 22nd March, 1917.

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any other offence of a like nature, it is the duty of the Court to which the application is made not only to see there is a *prima facie* case, but also to decide whether it is a fit case for prosecution in the interests of justice. The Court ought not to forget that statements which in fact are false are often made by men through the merest inadvertence or slips of memory.

Per Napier, J. It is not the function of the Court granting the sanction, but only of the Magistrate who hears the case, to decide whether there is a *prima facie* case for prosecution. It is the function of the Court which grants sanction to consider the whole of the circumstances of the case and decide whether it is in the interests of justice and purity of judicial proceedings that the person who has made the statement should be prosecuted.

Appeal against the order of the District Court of Tanjore, dated 15th September 1916, O. P. No. 442 of 1916 preferred against the order of the Court of the District Munsif of Shiyali in O. P. No. 514 of 1916 in O. S. No. 31 of 1914.

T. R. Venkatarama Sastri for the Appellant.

R. Kuppusami Aiyar for the Respondent.

The Court made the following

Abdur Rahim, J.

Order:—*Abdur Rahim, J.*:—The petitioner who is a pleader practising in the District Munsif's Court of Shiyali and a senior member of the profession there was party to a suit in which he was the plaintiff. He obtained a decree and the defendants deposited the amount of costs in Court. The petitioner for the purpose of drawing this amount from Court made an affidavit and in that affivadit he stated that the property which he gave as security according to the order of the Court was subject only to one encumbrance and was not subject to a mortgage in favour of one Vaidyanatha Aiyar. This apparently was not correct. When an amin was deputed to enquire whether the mortgage in favor of Vaidyanatha Aiyar did actually subsist, the petitioner admitted that he had made a mistake, and that as a matter of fact, there was this encumbrance also on the property. The learned District Munsif who heard the application made by one of the unsuccessful defendants in the suit for sanction for the prosecution of the pleader considered all the circumstances and came to the conclusion that it was not a proper case for prosecution. Having regard to the position and character of the petitioner and the nature of the statement made by him and the fact that when the Amin was sent, he admitted the mistake, the District Munsif was of opinion that it was not a proper case for prosecution for making a false declaration under S. 199 of the Indian Penal Code, The learned

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Abdur Rahim, J.

District Judge has reversed that order holding that since there was a *prima facie* case of making a false statement, all the other circumstances must be left for consideration at the trial. This in my opinion is a wrong view of the law. When sanction is asked for, for the prosecution of a person for making a false statement in the course of a judicial proceeding or for any other offence of a like nature, it is the duty of the Court to which the application is made not only to see that there is a *prima facie* case, but also to decide whether it is a fit case, for prosecution in the interests of justice. The Court ought not to forget that statements which in fact are false are often made by men through the merest inadvertence or slip of memory. It is no doubt true that when a person makes an affidavit, he ought to be extremely careful to see that every statement that is made there is strictly accurate. At the same time S. 199, Indian Penal Code contemplates that a statement in order to come within the purview of the section must be one which is either false to the defendant's knowledge, or which he ought to have known to be false or could not have believed to be true. Here there were facts upon which the District Munsif was justified in saying that although the statement in question was made in a rather reckless manner it was not a fit case for prosecution. The position and character of the petitioner, the fact that the property even with both the mortgages was sufficient security and the other circumstances in which the statement was made were matters which the District Munsif was entitled to take into consideration in coming to a conclusion whether there ought to be a prosecution or not. I am of opinion that the order of the learned District Judge granting sanction should be set aside.

Napier, J.

Napier, J.:—I agree. The learned District Judge in his order states as follows:—"His pleas and his previous characters are matters which would be more relevantly taken into consideration by the trying court." This statement of the law, I consider to be incorrect. S. 195 of the Criminal Procedure Code states that no court should take cognizance of certain offences except with the previous sanction of a court but does not state on what materials that sanction is to be based. Speaking for myself I have always held that the view largely prevailing in this court that the important matter to which a court should direct its attention is whether there was a *prima facie* case is incorrect. To my mind that is not the function of the court granting sanction. That is the function

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of the Magistrate who hears the case. It is the function of the Court which grants sanction to consider the whole of the circumstances of the case and decide whether it is in the interests of justice and purity of judicial proceedings that the person who has made the statement should be prosecuted. The Munsif has come to the conclusion that the statement was made not deliberately and intentionally to gain a benefit but as he puts it, in a reckless and haphazard manner and that makes the petitioner liable to blame of a reprehensible character. That seems to be exactly the right manner in which to view the action of the Vakil in this case. It is further pointed out by the Munsif that he is a gentleman of respectability and position and he obviously thinks that although he has been grossly reckless and may have brought himself within the mischief of S. 199, Indian Penal Code, he cannot have intended deliberately to mislead. That being so I think the District Munsif very properly refused sanction and I would set aside the order of the District Judge.

A. V. V. ——

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Mogadasu Venkatadasu and others ... *Appellants* (Defendants).*

v.

Venkamamidi Udayanarayan and others ... *Respondents (Plaintiffs.)*

Mogadasu Venkatadasu v. Venkamamidi Udayanarayan.

Ejectment—Suit by agraharamdars against tenants—Proof—Onus—Suit lands granted by Zemindar prior to Inam settlement—Interest conveyed—Presumption—Grant—Construction—Madras Estates Land Act, S. 3 (2) (d)—"Land-revenue"—Grantee's right under presettlement inam grant by Zemindar if prima facie*—S. 8 Exception—"Acquisition of kudivaram by transfer etc.—Presumption—Grounds—Inamdar excluding tenants from acquiring kudivaram and claiming kudivaram in himself for several years—Effect.*

Where certain agraharamdars, alleging to be owners of both varams in the lands in a village by virtue of a grant thereof in 1796 under a gift deed executed by a Zemindar, its then owner, sued to eject the defendants (tenants) and it appeared that the grant deed itself indicated that there were inhabitants residing in the village at the time of the grant and that, though it included the Ashtabogam, it excluded Savaram or home-farm lands from the gift ; *held*, that (1) the grant was only of the "land revenue" alone within the meaning of S. 3 (2) (d) of the Estates Land Act and not of the "kudivaram" also and (2) the onus lay on plaintiffs of proving that the grant was of the kudivaram also and not on defendants of proving that the suit lands were part of an estate.

* S. A. No 512 to 522 and 544 of 1916. 6th March, 1917.

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Per Sadasivaiyar, J:—In all cases of grants of inam the presumption is that the grant is only of the melvaram, unless the grant deed clearly confers kudivaram rights also.

What the zemindar was, prior to the Inam Settlement, entitled to obtain from the lands as a feudal landlord was connoted by the word "land-revenue", though, now, it would be called melvaram. Pre-Settlement Inams granted by Zemindars might therefore be well considered as merely grants *prima facie* of land revenue within the meaning of S. 3 (2) (d) of the Estates Land Act.

The fact that the inamdars prevented their tenants from acquiring kudivaram and claimed kudivaram in themselves for several years can be used to infer that the agraharamdars were entitled to kudivaram at the time of the grant but will not of itself give rise to a presumption of the acquisition by them of such right by means of transfer, succession, or other modes *ejusdem generis*.

The broad proposition of Miller, J. in *Ponnusami Padayachi* v. *Karuppudayan* [1], that the inamdar must be held to have the occupancy right when the tenants had no occupancy rights in themselves dissented from.

Second appeals against the decrees of the Additional Temporary Subordinate Judge's Court of Guntur in A. S. Nos. 1 to 14 of 1915, preferred against the decrees of the Court of the District Munsif of Tenali in O. S. Nos. 794, 805, 804, 792, 796, 797, 784, 786, 799, 793, 802, 795, of 1910.

P. Narayanamurthi and *B. Somayya* for Appellants.

V. Ramadoss for Respondents.

The Court delivered the following

Sadasiva Aiyar, J

Judgments :—*Sadasiva Aiyar, J*:—The defendants are the appellants in these Second appeals. The plaintiffs are agraharamdars who claim a right to eject the defendants (tenants) on the ground that they (the plaintiffs) are the owners of both the kudiwaram and Melwaram rights in the lands in the occupation of the defendants. Though the plaint does not definitely set out how the plaintiffs own both the warams it is clear from the 13th paragraph of the District Munsif's judgment that they claimed both warams as conferred upon their ancestor Dakshinamoorthy Sastrulu by the gift deed Exhibit A of 1796 executed by the then Zamindar who called himself Raja Manykyarow Bhavanarayana Rao, Sri Desamukhi Mannevaru, Sirkar Mrithijangan. I think therefore the only question in this case is whether the plaintiffs obtained both the warams under this grant exhibit A or the melwaram alone. If they obtained the melwaram alone, the kudiwaram not being granted to them and they not having claimed the kudiwaram as having belonged to them at the time of the

1. 26 M.L.J. 285.

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Sadasiva Aiyar, J

grant, the village is *prima facie* an estate under Sec. 3 (2) (d) of the Estates Land Act and the Civil Court has no jurisdiction over these suits. The presumption in all cases of grants of inam is that only the melwaram was granted as such inam. I think that courts should always start with that presumption in these cases, unless the grant deed clearly confers kudivaram rights also. In this case the grant deed (Exhibit A) itself indicates that there were inhabitants residing in the village at the time of the grant and it excludes Savaram or home-farm lands from the gift, and though it is a grant with all the Ashtabogam it has been held in *Parankusa Zatindra Mahadesikaswami* v. *P. Subramania Pillai* [1], that a grant with Ashtaboghan does not necessarily import the grant of the kudivaram also in the same manner that it clearly does not imply the grant of temple and other communal sites. I am therefore clear that the plaintiffs' case that the grant of 1796 included the kudivaram rights also cannot be supported. In coming to this conclusion I do not rely upon Ex. I in respect of which the District Munsif seems to have fallen into two inaccuracies in his judgment, namely (1) that it must have been prepared about 1786 and (2) that the reference to seri in Ex. I also indicated that there were already tenants occupying these lands. It appears from the Kristna Manual that the Collector Mr. Ram in whose time the register Ex. I was prepared became such Collector only in 1794 and it further appears that the word "seri" might have been used to describe the village in his time owing to its having been attached about the year 1800 or 1801 for recovery of arrears of Government Peishcush and Cowles for the Inam lands were granted to the Inamdars then. (See Ex. N series. Also Kristna Manual, page 320).

Mr. Ramadoss then argued that even if the grant was only of the melwaram it was not a grant of "land revenue" and therefore the inam did not fall within the definition of an estate found in S. 3, Cl. 2, sub-clause (d) of the Madras Estates Land Act, because the said sub-clause speaks of a "village of which the *land revenue* alone has been granted in inam and not a village of which the *melwaram alone* has been granted in inam. This contention seems to have found favour with both the lower courts. If it be held that no inam village granted *by a zamindar* before the Permanent Settlement would come under clause (d) of S. 3 (2)

1. (1914) 26 I C. 117.

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the result would be that as most of the pre-settlement inams would come under this head (very few having been granted directly by the Sovereign power under whose nominal suzerainty the zamindars held their estates), almost all such inam villages would be excluded from the purview of the Act. I am not at all prepared to accept this contention. Zamindars were supposed to have come in as only receivers of land revenue. They considered themselves to possess Royal authority and the pre-settlement inams granted by them might therefore be well considered by the Legislature as merely grants *prima facie* of land revenue. When the Inams were afterwards confirmed or recognised by the British Government they were so recognised and confirmed as grants of mere land revenue made by the Zamindars. It is also significant that in Clause (d) the kudivaram right is referred to in a subsequent portion of the same sentence in contra-distinction to "the land revenue alone" mentioned in the first portion showing that what the grantor was, in those days, entitled to obtain from the lands as a *feudal* landlord was connoted by the word "land revenue" though now, it would be called melwaram." Next it was argued that as the jurisdiction of the civil courts would be ousted by treating the inam village as an estate under S. 3 (2) (d), it lay upon the defendant to prove that it was an estate. I think that the several cases quoted by Mr. Ramadoss and which are found in *Indetichinna Nagadu* v. *Potukanchi Venkatasubbayya* [1], *Upadrasta Venkatasastrulu* v. *Divi Sitaramulu* [2], *Kidambi* v. *Kutumbarayudu* [3] and *Karri Narasayya* v. *Nageswara Rao* [4], proceed only to this extent, that it lay upon the defendants in such cases to prove that the grantee *was not the owner of the kudiwaram at the time of the grant.* I do not think that these cases afford any help to the decision of these suits as the plaintiffs do not claim that they were owners of the kudivaram interests in these lands at the time of the grant, but set up that the grant itself to them was of both kudivaram and melwaram; thus admitting that that they were not the owners of the kudivaram at the time of the grant.

The next contention of Mr. Ramadoss is that it must be presumed that he has acquired the kudivaram interest subsequent to the time of grant somehow and that under the exception to S. 8 of the Madras Estates Land Act, these lands had ceased

1 (1910) 1910 M. W. N. 639. 2 (1914) 26 M.L.J. 585=38 M. 891.
3. (1914) 27 M.L.J. 233=I.L.R. 39 M. 21. 4. (1915) 31 I. C. 209.

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Sadasiva Aiyar, J.

to be part of the inam estate. It has been held in *Upadrasta Venkatasastrulu* v. *Divi Sitaramulu* [1] that that exception applies only to acquisitions of kudivaram by means of transfer, succession or other modes *ejusdem generis* and not by means of relinquishment of his holding by the tenant. Mr. Ramadoss however argued that we can presume acquisition even by the former modes on the finding of the lower courts that nobody else was allowed by the Inamdars to require occupancy rights in these lands and that they have been claiming occupancy right for several years past. He relied especially upon the cases in *Virabhadrayya* v. *Sonti Venkanna* [2] and *Ponnusami Padayachi* v. *Karuppudayan* [3]. As regards the case in *Virabhadrayya* v. *Sonti Venkanna* [2], Benson and Sundara Aiyar, JJ., express the opinion that on the facts found in that case, the agraharamdars "must be taken to have been entitled to the kudivaram at *the time of the inam grant*" and not that they can be presumed to have subsequently acquired it. Thus the inamdar's preventing their tenants from acquiring kudivaram and claiming kudivaram in themselves for several years can be used by the lower courts only to infer that the agraharamdars were entitled to kudivaram at the time of the grant, but, as I said already, on the pleadings in these cases, the question of the inamdars being entitled to the kudivaram at the time of the inam grant does not arise.

As regards the case in *Ponnusami Padayachi* v. *Karuppudayan* [3], the opinion of one alone of the learned Judges (Miller, J.) can be relied on by the plaintiffs as laying down the broad proposition that the inamdar must have the occupancy right when the tenants have no occupancy rights in themselves. I must respectfully differ from such a broad proposition. As I said, it is open to the lower courts to infer from such a state of facts, only this, that at the time of the grant, the grantees had the kudivaram right. But even as regards such a presumption speaking for myself, I would not draw such an inference from that fact alone, if I was the Court of First Instance, knowing how inamdars and zamindars in the northern districts have always tried to deny occupancy rights to their tenants and to prevent their tenants from claiming such rights. Inamdars might very well be asked to establish that by transfer or succession &c., they got the

1. (1914) 26 M. L. J. 585. 2. (1913) 24 M. L. J. 659.
3. (1914) 26 M. L. J. 285

kudivaram right subsequently where it was admitted or proved they had not got the kudivaram right at the time of the grant.

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Sadasiva Aiyar, J.

In the result, I am of opinion that the village is an estate under S. 3 clause 2 (d) aud reversing the decision of the lower appellate court, I would order the return of the plaints in all these suits for presentation to the proper Revenue Court. The plaintiffs must pay the defendants' costs throughout.

Spencer, J.

Spencer, J;—I agree. I desire only to say a few words on the last question, viz., whether the agraharamdars can be regarded as having acquired by relinquishment any kudivaram right which they had not at the time of the grant. The first question to be decided here is whether these suits are cognisable by a civil court or by a revenue court. For the purpose of deciding that point it is necessary to see whether at the time of the grant the inam was given to a person not owning the kudivaram. If the plaintiffs intended to rely on the exception to S. 8 of the Madras Estates Land Act for ousting the jurisdiction of the revenue court, it was necessary that they should have advanced a specific case to show by what acts they acquired the kudivaram interest of their ryots and became entitled to both varams. But it was not the plaintiffs' case in their plaints that they had a grant only of the melvaram and that they subsequently acquired kudivaram right as regards all the lands comprised in these suits. It was their case that they got both the melvaram and the kudivaram rights under the grant. I therefore agree that the civil courts had no jurisdiction to entertain these suits and the plaints must be returned for presentation to the court having jurisdiction.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM.

Akula Bakkayya, Manager of the A. L. I. Company, Mangalagiri ... *Petitioner** (*Respondent.*)

v.

Aluri Venkatanarasimham ... *Respondent* (*Petitioner*).

Akula Bakkayya v. Aluri Venkatanarasimham.

*C. P. C.—Or. 9 R. 13—Applicability—*Ex parte *decree—what is—Appearance by pleader requesting for further time—Request not granted and decree passed on material on record—Application to set aside decree under O. 9 R. 13—Maintainability—Remedy of defendant.*

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* C. R. P. No. 1147 of 1916. 13th March. 1917.

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An old suit, which had been adjourned several times at the instance of defendant and in which a portion of the evidence had been let in, stood posted to the 16th November 1915 and was on that date again adjourned peremptorily to the next day at the instance of defendant. On the 17th, however, defendant himself did not appear and his pleader, who was present and who was the pleader who appeared in the case throughout, asked for further time to get "proper instructions." His application was refused, the suit proceeded with, and, after a number of witnesses had been examined for plaintiff, the evidence was closed and judgment was delivered against defendant on a subsequent date. On an application by defendant to set aside the decree on the ground that it was an ex parte decree, *held* that (a) the decree was not an *ex parte* decree because the request of defendants' pleader on the 17th must be deemed to be one for further time and defendant must therefore be deemed to have appeared with his pleader and (b) the proper remedy of defendant was by way of an appeal against the decree and not by an application under O. 9 R 13, C. P. C.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Guntur dated the 30th September 1916 in C. M. A. No. 25 of 1916 preferred against the order of the Court of the Principal District Munsif of Guntur dated 26th June 1915 in M. P. No. 8534 of 1915 in O. S. No. 645 of 1912.

P. Somasundaram for Petitioner.

B. Somayya for Respondent.

The Court delivered the following

Abdur Rahim, J.

Judgment:—The question on this petition is whether the decree of the District Munsif in favour of the plaintiff came within the purview of Rule 2 or Rule 3 of Order XVII of the Civil Procedure Code. The question whether any particular decree comes within one or other of these two rules is one not free from difficulty as there are conflicting rulings on the subject. Even supposing that the ruling in *Chandramathi Ammal* v. *Narayanaswami Aiyar* [1] which seems to be in conflict with the decisions in *Naganatha Aiyar* v. *Krishnamurthi Aiyar* [2], *Anandaraju* v. *Venkataraju* [3], and *Enatulla Basunia* v. *Jiban Mohan Roy* [4], is correct, it seems to me that the facts of the present case are distinguishable. The suit was instituted in 1912. It is clear from the applications and the orders passed thereon that the defendant applied for adjournment more than once and was given time. Even in 1913 the plaintiff himself was examined and cross examined, and one document was admitted in evidence as Ex. I. But the crucial dates are in November

1. (1910) I. L. R. 33 M. 241.
2. (1911) I. L. R. 34 M. 97.
3. (1914) 1 L. W. 423.
4. (1913) I. L. R. 41 C. 956.

Akula Bakkayya v. Aluri Venkata-narasimham.

Abdur Rahim, J.

1915. On the 16th November, the defendant asked for an adjournment and the suit was accordingly adjourned to 17th and it was made clear in the order that no further adjournment would be given. On the 17th, the defendant himself did not appear and his pleader who was present asked for further time to get 'proper instructions.' But the application of the pleader was refused and the suit was proceeded with and several witnesses of the plaintiff were examined. Then it was adjourned to the 19th. On the 19th, the 1st defendant himself appeared and so did his pleader and he wanted an opportunity to cross-examine some witnesses of the plaintiff. That prayer was refused because on the 17th the evidence in the case had been closed and the adjournment to the 19th was merely for a statement of the plaintiff's accounts being filed. Judgment was pronounced on the 25th in favour of the plaintiff upon the evidence recorded in the case. In these circumstances it cannot be said that the case was decided because of the default of appearance of the defendant. I think on the 17th the defendant did appear with his pleader. To my mind it would make no difference if the pleader asked for further time in order to get 'proper instructions.' It is not a case in which the pleader had no instructions. The same pleader appeared in this case throughout.

It seems to me that all that he wanted on the 17th was to get further time. I do not think that Rule 2 applies to the facts of this case, and it is in my opinion governed by Rule 3. In that view the proper remedy of the defendant was by way of an appeal against the decree and not by an application under Rule 13 of Order 9. The order of the District Judge must be set aside and the District Munsif restored with costs here and the court below.

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PRIVY COUNCIL.

PRESENT:—VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW, LORD PARMOOR AND MR. AMEER ALI.

[On Appeal from the Court of the Judicial Commissioner, Central Provinces.]

P. C.

Dal Singh v. The King-Emperor.

Dal Singh ... *Appellant**

v.

The King-Emperor ... *Respondent.*

Code of Criminal Procedure, 1898, (*Act V of* 1898), *S.* 172—*Police diary—Statements made to Police Officers—Evidence—Practice of the Judicial Committee in Criminal Appeals.*

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* February 5, 6, 7, 8 & 12, 1917.

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A diary made by the investigating police officer under S 172 of the Code of Criminal Procedure, 1898, may be used under that section to assist the Court which tries the case by suggesting means of further elucidating points which need clearing up, and which are material for the purpose of doing justice between the Crown and the accused, but not as containing entries which can by themselves be taken to be evidence of any date, fact, or statement contained in the diary. The police officer who made the diary may be confronted with it, but not any other witness.

Queen Empress v. *Mannu*,[1] approved.

Held, accordingly, that in deciding an appeal against a death sentence and in confirming that sentence the High Court erred in testing the credibility of the witnesses called at the trial by reference to the statements made by such witnesses to the police and entered in the police diary and in treating what was thus entered as evidence for that purpose.

The general principle is established that the Sovereign in Council does not act, in the exercise of the Prerogative right to review the course of justice in criminal appeals in the free fashion of a fully constituted Court of Criminal Appeal. The exercise of the Prerogative takes place only when it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of Courts below.

Error in procedure may be of a character so grave as to warrant the interference of the Sovereign. Such error may for example, deprive a man of a constitutional or statutory right to be tried by a jury, or by some particular tribunal. Or it may have been carried to such an extent as to cause the outcome of the proceedings to be contrary to fundamental principles which justice requires to be observed. Even if the Judicial Committee think an accused guilty, they will not hesitate to recommend the exercise of the prerogative if such be the case. But where the error consists only in the fact that evidence has been improperly admitted, which was not essential to a result which might have been come to wholly independently of it, the case is different. The dominant question is the broad one whether substantial justice has been done, and if substantial justice has been done, it is contrary to the general practice of the Board to advise the Sovereign to interfere with the result.

Appeal by special leave from a judgment of the Court of the Judicial Commissioner, Central Provinces, dated April 19, 1916, dismissing an appeal from a judgment of the Court of Sessions, Jubbulpore Division, dated February 24, 1916, whereby the appellant Dal Singh was convicted of the murder of a woman called Kalia, the wife of Mohan, under S. 302 of the Indian Penal Code and sentenced to death, and confirming that sentence.

The facts are sufficiently stated in the judgment of their Lordships. By an order of the 1st class Magistrate, Jubbulpore, dated November 19, 1915, five accused persons were committed for trial at the said Court of Sessions, two of them, Dal

1. (1897) I. L. R. 19 All. 390 (F. B.)

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Singh (the appellant) and Bhejraj on charges under S. 148 (rioting with deadly weapons) and S. 302 (murder), and the remaining three, Shankar, Nanhe and Mithu under S. 147 (rioting) of the Indian Penal Code. All the five were jointly tried by the Sessions Judge with the aid of two assessors. At the end of the case the assessors gave it as their opinion that none of the accused were guilty. They said they thought Mohan had murdered his wife in order to implicate the appellant. One of them added that Mohan had been telling untruths and that the whole case for the prosecution was false; and the other said that he did not believe either Mohan or his brother Jhunni, who were the principal witnesses for the prosecution. The Sessions Judge acquitted the accused other than the appellant, whom he found guilty of murder and sentenced him to death. It appeared from allusions in the judgment that the learned Judge had used the police diary as evidence in the case.

Against the said conviction and sentence the appellant appealed to the Court of the Judicial Commissioner, and the case also came before that Court for confirmation of the sentence under S. 374 of the Code of Criminal Procedure. But the appeal was dismissed and the sentence confirmed. In arriving at their conclusions the learned Judicial Commissioners used the police diaries as evidence, for the purpose of testing the credibility of the witnesses. The Appellant applied for and obtained special leave to appeal to His Majesty in Council.

De Gruyther, K. C., and *J. M. Parikh*, for the Appellant:— The Court of Appeal has used the police diaries in the case as evidence, and has thereby tested the credibility of the witnesses, with the result that it has believed the prosecution witnesses and disbelieved those for the defence. A Court of Criminal Appeal has no power to use as evidence the statements made to the investigating police officer or the contents of his diaries: Code of Criminal Procedure, 1898, Ss. 162 and 172; and *Queen Empress* v. *Mannu* [1]

The judgment of the Court of Appeal is vitiated by this error. The Criminal Procedure Code gives the Appellant a statutory right of appeal and also provides by S. 374 that the sentence must be confirmed by the High Court, which in this case is the Court of the Judicial Commissioner. The effect of the use of police diaries by the Court of Appeal is to deprive the appellant of those

1. (1897) I. L. R. 19 A. 390 (F. B.)

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statutory rights and such a deprivation constitutes grave and substantial injustice, and it is submitted that the case falls within the rule of practice of the Board as laid down. *In re Dillet,* 1 see also *Arnold* v. *King Emperor* 2.

It may be that the judgment of the Sessions Judge falls short of the rule of practice of the Board. But the Appellant is entitled to have his conviction considered by a Court of Criminal Appeal, and his sentence confirmed by the Court of the Judicial Commissioner. The Board not being a Court of Criminal Appeal it is submitted that the Judgment of the Court below should be set aside and the cases sent down for rehearing the appellant's appeal against his conviction and confirmation of his sentence. If, however, the Board decides to consider whether the conviction is right, the Board should do so as if it were a Court of Criminal Appeal and thus safeguard the Appellant's statutory rights. It is submitted that no Court of Criminal Appeal could or would uphold the conviction and confirm the sentence. Reference was also made to the Code of Criminal Procedure, 1898, Ss. 154, 156, 164, 376 and 439.

The information laid by the appellant before his arrest is not admissible in evidence under S. 25 of the Indian Evidence Act, 1872, as it is a confession made to a police officer. An admission by an accused person of any part which may tend to the proof of his guilt is a confession: Archbold's Criminal Pleadings, Evidence and Practice, Ed. 1910, p. 391. Here Dal Singh's information contains an admission of several facts which tend to prove his guilt, and is therefore not admissible.

Sir Erle Richards, K. C. and *Sir W. Garth,* for the Respondent.

[*Lord Haldane* asked Counsel to address the Board on the following points : (1) Whether in the Court of Appeal where the diaries were extensively used, the course adopted was justified ?

(2) The diaries being so used, what is the effect on the proceedings in the appeal and on confirmation ?

(3) What is the position of the Board having regard to the case In re Dillet ?]

As to (1) it is submitted that both the Sessions Court and the Court of Appeal had power under S. 172 to use the diaries to aid the Court. As to (2) the statements made to the police are not

1. (1887) 12 A. C. 459.
2. (1914) L. R. 41. I. A. 149.

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used as evidence; but even if they were so used, it is submitted that apart from police diaries there was evidence in the case on which the Court of appeal could and would have come to the same conclusion, and the Board would be justified in maintaining the confirmation : See Indian Evidence Act, 1872, S. 167. There is no injustice, substantial or otherwise, done in this case. With regard to (3) it must be shown that there was a substantial defect in the practice which goes to the root of the case, and that owing to that defect there has been miscarriage of justice. But here there has been no defect contrary to natural justice, and the use of the police diaries added a little colouring but did nothing contrary to natural justice. The case does not come within the rule of practice as laid down in *Dillet's case* [1], *Arnold* v. *King-Emperor* [2], and *Ibrahim* v. *The King* [3]. Reference was also made to various sections of the Code of Criminal Procedure including S. 4 (k) and those in chapters 18, 22, 23, and 31.

De Gruyther, K. C., replied referring to *Ibrahim* v. *King-Emperor* [3], *Majin's Case* [4] and *Subramania Iyer* v. *King-Emperor* [5].

The judgment of their Lordships was delivered (March 8 1917) by

Viscount Haldane.

Viscount Haldane :—In this case the appellant was convicted of murder by the Sessions Court of Jubbulpore, and was sentenced to death. The Court of the Judicial Commissioner of the Central Provinces heard an appeal and dismissed it and confirmed the sentence under the provisions of the Indian Code of Criminal Procedure.

A petition for leave to appeal was presented to the King in Council. It was argued before this Board in support of the petition that the judgment in the Courts in India had been vitiated by an illegal and prejudicial use of the police diaries in the case, and that the credibility of the witnesses had been thereby wrongly estimated. What had taken place, it was alleged, had led to such a miscarriage of justice as to bring the conviction within the exceptional class of cases in which His Majesty in Council will review the proceedings in a criminal trial in India.

1. (1887) 12 A. C. 459.
2. (1914) L. R. 41 I. A. 149.
3. (1914) L. R A. C. 599.
4. (1894) A. C. 57.
5. (1901) L. R. 28 I. A 257=I. L. R. 25 M. 6.

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It is well settled that the unwritten principles of the Constitution of the Empire restrain the Judicial Committee from being used in general as a Court of Review in criminal cases. But while the Sovereign in Council does not interfere merely on the question whether the Court below has come to a proper conclusion as to guilt or innocence, such interference ought to take place where there has been a disregard of the proper forms of legal process, grievous aud not merely technical in character, or a violation of principle in such a fashion as amounts to a denial of justice. Their Lordships have now heard full arguments in the case before them, and have examined the procedure and evidence with some minuteness.

Before considering the result, it is right that they should state what they conceive to be, in a case such as that before them, the character of the limitation of their function. The Constitution of the Empire is tending to develop in the direction of regarding as final decisions given in the local administration of criminal justice. The general principle is established that the Sovereign in Council does not act, in the exercise of the prerogative right to review the course of justice in criminal cases, in the free fashion of a fully constituted Court of Criminal Appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as, for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below.

In the light of these observations, their Lordships turn to the circumstances in the present case. There is no doubt that, on the 23rd October, 1915, a woman named Kalia, who lived at Hardua, a village near Jubbulpore, was murdered by blows from some such weapon as an axe. The blows were of a deadly character, and one of them almost decapitated her. The prosecution alleged that the blows were delivered by the accused, Dal Singh. The defence was that they came from one Mohan, the husband of Kalia, who was said to have killed his wife in order to lay the foundation of a false charge against Dal Singh.

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The case made for the prosecution was shortly as follows: That, on the morning of the murder, Dal Singh sent for Mohan, who was one of his tenants, and forced him to work at his (Dal Singh's) granary without payment; that, at the time of the midday meal Mohan went back to his own field, and when sent for by Dal Singh refused to return; that thereafter, about 4 P. M., the accused came to Mohan's field on horse-back, accompanied by four servants, with the object of forcing Mohan to return to work; that an altercation then ensued, in the course of which the accused, who had an axe in his hand attacked Mohan; that the latter climbed up his *marwa* a platform raised on a framework of poles with bars across them) to escape from him, and while standing on one of the cross-bars was cut on the legs by the accused with the axe; that Mohan shouted out, and his wife, Kalia, then sought to restrain the accused by clasping him round the waist, and was thereupon killed with axes by the accused and one Bhojraj, a servant of his; that as the accused was remounting his horse to go away, one Jhunni, a brother of Mohan, came up, having been attracted by the latter's cries, and hit the accused on the head with a stick, knocking off his cap and causing him to drop his axe; that the accused then rode away, accompanied by his servants.

The defence was that Dal Singh was not present when the murder was committed, and that Kalia was really killed by her husband, Mohan, for the purpose of getting up a false charge against Dal Singh. Kalia was said to have been blind, and it was contended that it was hardly possible that she could have been able to find and lay hold of Dal Singh in the manner suggested.

The charges laid by the police, and ultimately tried, were that Dal Singh and Bhojraj had rioted with deadly weapons, and had committed murder, and that Shanker, Dal Singh's servant, and Nanhi and Mithua, who were also his servants, and who were alleged to have accompanied him to Mohan's field, armed with *latis*, or sticks were guilty of rioting. At the trial Bhojrai and the other servants were acquitted, and comments were made by the Sessions Court Judge on the inconvenience of not being able to deal with the capital charge at a separate trial, in which there would have been greater freedom for the examination of the servants as witnesses. These, however, made statements at the trial which supported the defence set up by Dal Singh, the character of which was briefly as

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follows: He stated that on the day of the murder, about two in the afternoon, he was riding on his way from Hardua to Jubbulpore, accompanied by Shanker, who was on foot. When he reached a certain field Mohan and Jhunni, who were stated to have been hiding in the underbush, assaulted him with sticks. On being struck he went on to the station house at Patan, calling at Singhori on the way, where he got his relative, Himmat Singh, to accompany him to Patan. He stated that at the station he reported what had occurred to the native constable there, who took down what he said. The native sub-inspector in charge of the station, Harkishen, says that the report was taken down from Dal Singh's narrative in his (Harkishen's) presence, and was afterwards signed by Dal Singh. The latter had a wound on the head, for the treatment of which he was sent to the neighbouring hospital. Meantime there arrived at the station Jhunni, the brother of Mohan, and one Parbat, who stated in the box that he had been attracted to the scene of the murder, by the shouting of Mohan, and had been requested to go with Jhunni to report to the police. Jhunni and Parbat reported the murder, and the officer in charge, after questioning them, sent for Dal Singh from the hospital and arrested him.

It is important to compare the story told by Dal Singh when making his statement at the trial with what he said in the report he made to the police in the document which he signed, a document which is sufficiently authenticated. The report is clearly admissible. It was in no sense a confession. As appears from its terms, it was rather in the nature of an information or charge laid against Mohan and Jhunni in respect of the assault alleged to have been made on Dal Singh on his way from Hardua to Jubbulpore. As such the statement is proper evidence against him. The statement is as follows :—

"To-day" (the day on which Kalia was murdered), "at 4 P. M., I went from Hardua, taking my servant, Shanker, son of Girdhari Khangar with me, to the *kachhra* [field] of Nanha Mallah to call Mohan Mallah ; because this morning he had been to work at my place, and, leaving the work before he had finished it, he had run away. His plough had been requisitioned for sowing purpose. I said to him, 'Come to work.' He replied, 'I will not go' Thereupon I spoke to him harshly, for which Mohan struck me at once with a *lathi* on the right side of my head, and his brother, Jhunni, hit me once with a *lathi* on my back. Therefore I, becoming unconscious, fell from my horse My servant, Shanker, cried out, and Maniram Kotwar and Bhojraj Lodhi came there. [Thereupon] these people ran away, and Shanker, Bhojraj [and] Maniram raised me and carried me home. And Jhunni and Mohan have beaten their *dukariya* [old woman] with *lathis*, and

are making preparations to bring a false case against me. Possibly they are coming to make a report."

It will be observed that this statement is at several points at complete variance with what Dal Singh afterwards stated in Court. The Sessions Judge regarded the document as discrediting his defence. He had to decide between the story for the prosecution and that told for Dal Singh.. In considering his judgment in which the evidence is examined fully, their Lordships do not propose to follow him in examining in that judgment the details he deals with. They have observed no material point in which he appears to have gone wrong. They are aware that the Sessions Judge tried the case with two native assessors who differed from his conclusion. But these assessors gave no reasons for so differing which their Lordships can consider adequate. The Sessions Judge had before him as witnesses whom he believed, Mohan and Jhunni, who testified to having been present when the murder took place and to the details of the account of it given for the prosecution. He also had before him a number of witnesses called for Dal Singh to establish his version of the events of the afternoon of the day on which Kalia lost her life. The Judge held that their testimony was untrustworthy because of serious discrepancies between the versions given by the various witnesses, and on other grounds. In the main he accepted the narrative given by Mohan and Jhunni, and, as he held, confirmed by the facts established. Their Lordships have scrutinised the evidence in order to see whether any miscarriage of justice of the exceptional kind already defined has taken place. So far from finding any such miscarriage in the proceedings at the trial, they see no reason for differing from the conclusions come to by the presiding Judge, or from the reasons given by him in weighing the credibility of the witnesses. They have formed the same impression as he did of the probabilities of the two stories, as well as of the effect of the medical evidence. Had the decision been given solely on the testimony of the witnesses called at the trial and such documents as were plainly admissible, the proceedings would have given rise to no question of substance. The learned Judge who tried the case gave his judgment to so large an extent on proper materials that, even if, here and there, he alludes to documents which were not properly in evidence,, he has in no case done so in such a fashion as to imperil the concluson at which he arrived, tested by standard of substantial justice.

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But in the Court of Appeal further material was brought under consideration, and it is in this connection that more difficult questions have been raised. The Court of Appeal might, in their Lordships' opinion, have properly dismissed the appeal on the simple ground that an examination of the evidence on the record disclosed no reason to differ from the finding of the Judge who tried the case. But they were not content to confine themselves to this safe ground, for, although they expressed substantial agreement with the reasons he gave, they went on to take into consideration the police diary made during the preparation of the case and antecedently to the trial. The quesition which has now to be considered is whether the appearance of this feature in the judgment of the Court of Appeal vitiates the judgment and confirmation required by the Criminal Procedure Code.

Under Section 172 of the Code every police officer making an investigation is to enter his proceedings in a diary, and any Criminal Court may send for the police diaries of a case under enquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial. Such a diary was kept in the present case, and the Judge who tried it had the diary before him. Under Part VII of the Code an appeal is permitted, subject to certain restrictions, and an appeal was brought to the Court of the Judicial Commissioner in the present case, and was heard by two Judges. By Section 374, when the Court of Session passes sentence of death the proceedings are to be submitted to the High, Court (in this instance the Court of the Judicial Commissioner) and the sentences is not to be executed unless it is confirmed by the High Court. On the 19th April, 1916, the sentence on Dal Singh was confirmed by the Court of the Judicial Commisoioner "for the reasons given in our judgment of this date" on the appeal.

Had the Court of Appeal simply taken the same course as the Sessions Judge and affirmed his judgment on the evidence on the record, it is evident that the conviction would not have been reviewed by this Board. For, as their Lordships have already stated, there was adequate and proper evidence upon which that Judge could and did convict. The Judges in the Court of Appeal considered this evidence, and did not differ on any material point from the view he took of it. But, apparently with the view of making their opinion still more conclusive, they went

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on, after examining the evidence of the witness and testing the credibility of those called for the defence by referriug to the discrepancies in the testimony of the witnesses on which the trial Judge had properly dwelt, to test that testimony still further by reading the earlier statements of these witnesses made to the police and entered in the police diary. In other words, they treated what was thus entered as evidence which could be used at all events for the purpose of discrediting these witnesses. In their Lordships' opinion, this was plainly wrong. It was inconsistent with the provisions of S. 172 of the Criminal Code. To use the diary for the purpose they did was to contravene the rule laid down in *Queen Empress* v. *Mannu* [1] where a full Court pointed out that such a diary may be used to assist the Court which tries the case by suggesting means of further elucidating points which need clearing up, and which are material for the purpose of doing justice between the Crown and the accused, but not as containing entries which can by themselves be taken to be evidence of any date, fact, or statement contained in the diary. The police officer who made the entry may be confronted with it, but not any other witness.

The question which arises is, therefore, whether the improper use made of the entries by the Court of Appeal is a sufficient reason why the Judicial Committee should recommend interference with the judgment and sentence. In their Lordships' opinion, it is not such a reason. They have already stated that they have no ground for doubting that the trial Judge properly convicted and sentenced Dal Singh. He then had an appeal heard by the proper Court, and the sentence was confirmed by that Court. The conditions of the Code as to jurisdiction have thus been complied with. The Court of Appeal had before it evidence on which it placed reliance, and on which it could properly have based its affirmance and confirmation of the conviction. It plainly went wrong in using the diary. Now it is true that error in procedure may be of a character so grave as to warrant the interference of the Sovereign. Such error may, for example, deprive a man of a constitutional or statutory right to be tried by a jury, or by some particular tribunal. Or it may have been carried to such an extent as to cause the outcome of the proceedings to be contrary to fundamental principles which justice

1. (18 97) I. L. R. 19 All. 390.

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requires to be observed. Even if their Lordships thought the accused guilty, they would not hesitate to recommend the exercises of the prerogative, were such the case. But where the error consists only in the fact that evidence has been improperly admitted, which was not essential to a result which might have been come to wholly independently of it, the case is different. The dominant question is the broad one whether substantial justice has been done, and, if substantial justice has been done, it is contrary to the general practice to advise the Sovereign to interfere with the result. The point in the present appeal is therefore whether, looking at the proceedings as a whole, and taking into account what has properly been proved, the conclusion come to has been a just one.

In the result their Lordships will therefore humbly advise His Majesty that the Appeal should be dismissed. There will, as hitherto has been usual in such cases, be no order as to costs.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors fo Respondent: *The Solicitor, India Office.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

PRESENT:—MR. JUSTICE AYLING, MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE BAKEWELL.

Kopparthi Lingayya and others ... (*Appellants* Petitioners, Creditors*)

v.

Araveti Chinnarayana and others ... *Respondents. (Respondents of whom 1 to 3 are debtors).*

Kopparthi Lingayya v. Araveti Chinnarayana.

Provincial Insolvency Act, Ss. 6, 16 (4) and 17—Period of limitation fixed by the Act for petitions and appeals—Applicability of the general provisions of the Limitation Act to—Limitation Act, Ss. 5 to 25 and 29—"Affect the period of limitation" meaning of—Necessity for legislative interference.

Recourse cannot be had to the general provisions of the Limitation Act (IX of 1908) in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act.

Abu Bucker Sahib v. Secretary of State for India [1]. followed

Whenever an attempt is made to construe a special period fixed by an enactment with reference to the general provisions of the Limitation Act, the effect of such a process would be " to affect the period of limitation' fixed by that enactment within the meaning of S. 29 of the Limitation Act.

The necessity for legislative interference pointed out

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* A. A. O. No. 137 of 1916. 26th September. 1917.

1. (1909) I. L. R. 34 M. 505.

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Kopparthi Lingayya v. Araveti Chinnarayana.

Appeal against the order of the District Court of Cuddapah, dated 11th October 1915 in I. P. No. 9 of 1915.

C. A. Seshagiri Sastri for Appellants.

Dr. S. Swaminadhan, P. Somasundaram and *V. S. Narasimhachariar* for Respondents.

The Court (Spencer and Srinivasa Iyengar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

This is an appeal against an order of the District Judge of Cuddapah passed under S. 15 of the Provincial Insolvency Act dismissing an application made by creditors to declare the respondents insolvent. The learned Judge dismissed the application on the ground that the act of insolvency complained of occurred more than 3 months before the presentation of the petition, the last date for presentation having fallen in the period during which the Court was closed for vacation. He held that the petition could not be presented on the re-opening day as S. 4 of the Indian Limitation Act was not applicable, and that S. 10 of the General Clauses Act could not save the petitioners, as a question of limitation was involved.

The appeal against the District Judge's order, for which S. 46 of the Act provides, has not been presented within 90 days of the order. Unless the time occupied in obtaining a copy of the order appealed against be excluded under S. 12 or S. 5 of the Indian Limitation Act, this appeal must be rejected.

The question for our decision therefore is whether Ss. 4, 5 or 12 of the Indian Limitation Act are applicable to proceedings under the Provincial Insolvency Act.

The latest decision of this Court on the point is *Sivaramayya* v. *Bhujanga Rao* [1], wherein Oldfield, J. expressed his opinion that S. 12 (2) of the Indian Limitation Act could not be applied to proceedings under the Provincial Insolvency Act. The learned Judge was inclined to think that S. 5, being one of the general provisions of the Act and not altering or affecting any period of limitation within the meaning of S. 29 (1) (*b*) might be applicable, but he felt himself bound to follow the decisions in *Veeramma* v. *Abbiah*, [2] and *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi* [3]. Sadasiva Aiyar, J., who sat with him, considered that S. 5 was

1. (1915) I. L. R. 39 M. 593.. 2. (1894) I. L. R. 18. M. 99.
3. (1896) I. L. R. 20 M. 249=7 M L. J. 94

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applicable. He distinguished *Veeramma* v. *Abbiah*, [1], dissented from *Appa Rau Sanayi AswaRau* v. *Krishnamurthi*[2] and followed *Nijabutoolla* v. *Wazir Ali* [3], *Reference under Forest Act V of 1882* [4] and *Seshama* v. *Sankara*, [5]. Both learned Judges agreed to cut the Gordian knot under the exceptional circumstances of that case by treating the time-barred appeal as a revision petition and dealing with it under S. 15 of the Charter Act, a course which can be taken only when the High Court in the exercise of its power of superintendence considers that a subordinate Court has failed to do its duty. *Vide Abdullah* v. *Salaru*, [6].

The present appeal purports to have been brought under S. 15 of the Charter Act, as well as under S. 46 Clause (2) of Act III of 1907, but the circumstances are not such as to warrant our proceeding under the Charter.

Duraiswami Iyengar v. *Meenakshi Sundara Iyer* [7], to which Oldfied, J., was agafn a parey, is a direct decision that S. 12 of the Indian Limitation Act is not applicable to applications under the Provincial Insolvency Act, and was followed by the same learned Judge in *Trasi Deva Rao* v. *Parameshwaraya* [8] in respect to another section, namely S. 14 of the India Limitation Act, with the remark that the whole of that Act is inapplicable to proceedings under the Provincial Insolvency Act.

In none of the above cases was the decision in *Srinivasa Aiyangar* v. *The Secretary of State for India*, [9], considered. That was a case wherein Benson and Sundara Aiyar, JJ., after a very full consideration of the law on the subject, applied S. 15 of of the Indian Limitation Act to a suit instituted under S.59 of the Revenue Recovery Act (II of 1864). They held (we think rightly) that the special period for bringing suits under that Act was governed by the provision in S. 59, which allows six months' time, rather than by any article in the schedules to the Indian Limitation Act, but that the general provisions in the body of the Act were intended to be applicable, in the absence of anything to the contrary, to proceedings under special or local laws. In so doing, they followed the authority of a Bench of this Court

1. (1894) I. L. R. 18 M. 99.
2. (1896) I. L. R. 20 M. 249=7 M.. L. J. 94.
3. (1882) I. L. R. 8 Cal. 910.
4. (1886) I. L. R. 10 M. 210.
5. (1888) I. L. R. 12 M. 1.
6. (1895) I. L. R. 18 All 4.
7. (1914) 16 M. L. T. 246.,
8. (1914) I. L. R. 39 M. 74.
9. (1913) 24 M. L J. 41.

in *Seshama* v. *Sankara* [1], and of a Full Bench in *Venkata* v. *Chengadu* [2].

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The Full Bench decision in *Abu Backer Sahib* v. *The Secretary of State for India* [3], which formed the basis for the decision in *Duraiswami Aiyangar* v. *Meenakshi Sundara Iyer*, [4] was to the effect that appeals under S. 10 of the Madras Forest Act (V of 1882) are independent of the general provisions of the Indian Limitation Act.

The right conferred by Ss. 10 and 14 of the Madras Forest Act to appeal against decisions of Forest Settlement Officers upon claims to have certain rights recognised at the time of affore station, to a District Court and to a Forest Court respectively are evidently rights of a very special nature. As pointed out by the Chief Justice, the vesting of a power to extend time for appealing in the hands of the Governor-in-Council is in itself an indication that the Courts were not intended to exercise a similar power under the Indian Limitation Act in regard to these so-called appeals.

The cases in *Veeramma* v. *Abbiah* [5], and *Appa Rau Sanayi Aswa Rao* v. *Krishnamurthi* [6], related to the applicability of the provisions of the Indian Limitation Act to acts done in relation to the Indian Registration Act. *Sivarama Patter Kariakar* v. *Krishna Aiyar* [7], which followed these two decisions, held that independently of the Indian Limitation Act, S. 10 of the General Clauses Act would operate to make a presentation on the first day after the Court re-opened, though after the time allowed in the Registration Act, a good presentation. So too in *Messrs. Arbuthnot and Co.* v. *Sabapathy Mudaliar* [8] an appeal presented under the Indian Insolvency Act on the re-opening day, when the last day for filing it fell on a holiday, was admitted.

In *Veeramma* v. *Abbiah* [1], and *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi* [2], as in other decisions, it has always been held that what must be looked to in deciding whether the Indian Limitation Act can be applied to a special or local law is the question whether the particular Act is or is not self-contained and complete in itself.

1. (1888) I. L. R. 12 M 1.
2. (1888) I. L. R. 12 M. 169 (F. B.)
3. (1909) I. L. R. 34 M. 505 (F. B.)
4. (1914) 16 M. L T. 246.
5. (1899) I. L. R 18 M. 99.
6. (1876) I. L. R. 20 M. 249.
7. (1914) 26 M. L. J. 307.
8. (1912) 23 M. L. J. 221.

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It has been settled by a course of decisions that the Madras Forest Act and the Indian Registration Act are special Acts complete in themselves, and we do not here propose to question the reasoning by which that result has been arrived at.

But Ss. 6 and 47 of the Provincial Insolvency Act show that that enactment is at least not independent of the rules of Civil Procedure followed in the trial of regular suits and appeals under the Civil Procedure Code.

We also think that the analogy of the Madras Forest Act did not justify the assumption in *Duraiswamy Aiyangar* v. *Meenakshisundara Iyer*, [1] that the general provisions of the Indian Limitation Act were not applicable to the Provincial Insolvency Act on the strength of *Abu Backer Sahib* v. *The Secretary of State for India* [2].

In our opinion the correct view is that taken by the Allahabad High Court in *Dropadi* v. *Hiralal* [3] where the matter has been fully discussed by a Full Bench.

We consider that the cases in *Duraiswami Aiyangar* v. *Meenakshisundara Iyer* [5] and *Trasi Deva Rao* v. *Parameshwaraya* [4] were wrongly decided, and that the *dictum* of Oldfield, J., in *Sivaramayya* v. *Bhujanga Rao* [5] as to the applicability of Ss. 5 and 12 of the Limitation Act to proceedings under the Provincial Insolvency Act was also incorrect. But as there is so much divergence of opinion on the point, we refer to a Full Bench the question whether recourse can be had to the general provisions of Act IX of 1908 in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act (III of 1907).

A. Krishnaswami Aiyar and *C. A. Seshagiri Sastri* Vakils for the Appellants.

Dr. S. Swaminadhan, Counsel for the 5th Respondent.

P. Somasundaram for the 4th and 9th Respondents.

V. S. Narasimachar Vakil for Respondent Nos. 17 & 8.

The Court expressed the following

Opinion :—*Ayling, J.* :—The question propounded for our decision is :

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1. (1914) 16 M. L. T. 246. 2 (1909) I. L. R. 34 Mad. 505.
3. (1911) I. L. R. 34 All. 496 4. (1914) I. L. R. 39 Mad 74=29 M.L J. 451.
5. (1915) I. L. R. 39 Mad. 593.

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Whether recourse can be had to the general provisions of Act IX of 1908 in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act III of 1907 ?

The obstacle to the application of these general provisions is S. 29 of the same Act which says :—

"Nothing in this Act shall.........................affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India."

The meaning of this section has been considered by a Full Bench of this Court in *Abu Backer Sahib* v. *The Secretary of State for India* [1]; and in my opinion that judgment effectively answers the question before us. In place of S. 29 of Act IX of 1908 and the Provincial Insolvency Act, the learned Judges were dealing with S. 6 of Act XV of 1877 (the previous Limitation Act.)

The learned Vakil for appellnts has in fact been forced to argue that the decision in *Abu Backer Sahib* v. *The Secretary of State for India* [1] was wrong and requires reconsideration. How far we are entitled to question the correctness of a considered ruling of a Full Bench of equal numerical strength is a matter into which I do not propose to enter for I entirely and respectfully concur in the ruling now called in question. It is a pure question of interpretation of a statute. The juxtaposition of the words "affect" and "alter" compel us to give an independent meaning to the word "affect;" and I cannot understand how the application of the general provisions extending in certain circumstances the period fixed by law can be held not to "affect" that period.

The cases mainly relied on by appellants' Vakil are *Venkata* v. *Chengadu* [2] and *Srinivasa Ayyangar* v. *Secretary of State* [3]. In the latter case the two learned Judges were inclined to question the correctness, or rather the general applicability, of the decision, in *Abu Backer Sahib* v. *The Secretary of State for India* [1], largely because the Full Bench ruling in *Venkata* v. *Chengadu* [2] had not been considered; but they deemed it unnecessary to decide whether S. 29, Indian Limitation Act rendered the general sections of the Limitation Act inapplicable to special and local Acts generally. They disposed of the case before them

1. (1909) I. L. R. 34 M. 505=20 M. L. J. 283.
2 (1888) I L R. 12 M. 168. (F. B.)
3. (1912) I. L. R. 38 M. 92=24 M. L. J. 541.

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with an eye solely to the peculiar features of the Act with which they were dealing—Act II of 1864 : and I need hardly point out even if the two were mutually destructive, the authority of this ruling cannot be held to counterpoise the Full Bench decision.

The decision in *Venkata* v. *Chengadu* [1] was that of a Bench of four Judges the main Judgment being that of Muthusami Aiyar, J., the question referred for their decision did not relate to the applicability of the general sections of the Limitation Act, or the interpretation of S. 6 of the same (corresponding to S. 29 of the present Act); but to whether the provisions of the Limitation Act (Art. 95 Sch. II) or S. 59 of Act II of 1864 should be followed in computing the period of limitation. No doubt Muthusami Aiyar, J. expressed the opinion, with the concurrence of Kernan, J. that S. 6 of the Limitation Act did not bar the application of the general sections. *Kullayappa* v. *Lakshmipathi* [2] is another pronouncement of the same two learned Judges to the same effect. But the other two Judges, who were parties to I. L. R. 12 Mad. 168 (Parker and Wilkinson, JJ.) expressed no opinion on the point; and this is remarked by Benson and Sundara Aiyar, JJ. in their judgment in *Srinivasa Ayyangar* v. *Secretary of State* [3]. The decision in *Kullayappa* v. *Lakshmipathi* [2] is certainly not entitled to be treated as a Full Bench decision on the question now before us.

Veeramma v. *Abbiah* [4] is another Full Bench case in which Muthusami Aiyar and Shephard, JJ. expressed contrary views as to the effect of S. 6 of Act XV of 1877. Collins, C.J., does not refer to the section; but, by implication, he would seem to have favoured Shephard J's view.

I can find nothing in these cases, which would induce me to differ from the view of the learned Judges in *Abu Backer Sahib* v. *Secretary of State for India* [5].

It has been suggested that in the case of an appeal to a District Court (with which we are not concerned here) the period allowed by S. 47 (4) Provincial Insolvency Act (30 days) is so short that it might be impossible to procure copy of the order in time for presentation with the appeal, as required by Order 41, Rule 1 (*Mutatis Mutandis*) and that in such a case a Court could

1. (1888) I. L. R. 12 M. 168. (F. B.) 2. (1889) I. L. R. 12 M. 467.
3. (1912) I. L. R. 38 M. 92 4. (1894) I. L. R. 18 M. 99.
5. (1909) I. L. R. 34 M. 505.

not be asked to enforce the limitation clause, S. 46 (4). That is not the case here: and we are not called on to say what a Court should do, if such facts were established. The possibility of such a difficult case may be a ground for legislation, or, possibly, the provision of a remedy in the rules and orders under the Civil Procedure Code. But we have merely to interpret the law as it stands: and I feel no hesitation in answering the reference in the negative.

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Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—Both sides are agreed that the only question to be considered in this reference is whether the time taken up for obtaining copies of the order appealed against should be deducted in computing the period of limitation fixed by S. 46, Clause 4 of the Provincial Insolvency Act. The decision of the question turns largely upon the interpretation to be placed upon S. 29 of the Indian Limitation Act. A very learned argument was addressed to us by Mr. A. Krishnasami Aiyar upon the meaning to be attached to the word "affect" in clause 1 (*b*) of that Section. Apart from authority, if I were deciding this question for the first time, I would have respectfully concurred in the view taken by three learned Judges of this Court including the present Chief Justice in *Abu Backer Saheb* v. *Secretary of State for India* [1]. The word *alter* would apply directly to similar provisions in the Limitation Act, if any, giving an extended period to suits or appeals of the nature provided for in the Special act. The word "affect" is more comprehensive. Whenever by a process of computation or exclusion or deduction the special period fixed by the enactment is indirectly extended or cut down, it must be taken that that period has been *affected.* The illustration which Mr. Krishnasami Aiyar suggested would also be connoted by the term 'affect'; for example, there may be a special period compelling a party to take steps to set aside the order of a Special Officer under the Boundaries Act. When a party instead of adopting that course wants to avail himself of the general period of limitation prescribed for a declaration of title in Article 120 of the Limitation Act, the relief granted to him would indirectly affect the period of limitation prescribed in the special law. The decision of the Full Bench in *The Secretary of State for India* v. *Assan* [2], is an illustration of this mode of *affecting* the period of limitation fixed in a Special act. But, I am not

1. (1909) I. L. R 34 M 505
2. (1915) I. L. R. 39 Mad. 727=30 M. L. J. 255. [F. B.]

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prepared to agree with the learned Vakil that this category of cases exhaust the significance of the word 'affect.' Nor am I prepared to accede to the contention that a computation of period of limitation which in effect extends the time fixed does not *affect* the period of limitation. In my opinion, wherever an attempt is made to construe a special period fixed by an enactment with reference to the general provisions of the Limitation Act contained in Ss. 5 to 18, the effect of such a process would be to *affect* the period of limitation prescribed by the Local Act. Therefore my reading of the section apart from authority is in accordance with the pronouncement in *Abu Backer Saheb* v. *Secretary of State* [1]. But the matter has been complicated a great deal by other decisions to which I shall presently very briefly refer.

Before dealing with the cases quoted at the Bar, I may dispose of one aspect of the case which was very strongly pressed upon us by Mr. Krishnasami Aiyar. He did not dispute the proposition that where a special Act is self-contained the general provisions of the Limitation Act should not be imported into the consideration of questions arising under the former Act. Upon this point we have the judgment of the Judicial Committee in *Mohummud Buhadoor Khan* v. *The Collector of Bareilly* [2], that to Acts of a special kind which are self-contained, the general provisions of the Limitation Act should not be annexed. Sir Arthur Collins, C.J., and Muthusami Ayyar, J. followed this decision in *Veeramma* v. *Abbiah* [3]. There are other decisions to the same effect; and therefore it may be taken as settled that where the Code is complete in itself the general provisions of the Limitation Act commencing from Ss. 5 to 18 should not be read as forming part of that Code. In the present case it was contended that the Provincial Insolvency Act is not a code complete in itself. I thing this contention is well founded.

We have only to refer to Ss. 6 and 47 to show that the Civil Procedure Code was intended to be largely utilized in regard to proceedings under the Act. Therefore the Act has to be supplemented by the importation of the general rules of procedure as to suits.

One special matter affecting limitation may also be pointed out and that is, by S. 47 of the Provincial Insolvency Act the procedure to be followed in presenting appeals under that Act are

1. (1909) I. L. R. 34 M. 505. 2. (1874) L. R. 1 I. A. 167.
3. (1894) I. L. R. 18 M. 99

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to be the same as in the case of appeals under the Civil Procedure Code. As the learned vakil pointed out under the Civil Procedure Code an appeal can be filed only if the memorandum is accompanied by copies of the decree and of the judgment. It is well recognised that an appeal filed without these annexures must be regarded as no presentation in the eye of law. See *Chamela Kuar* v. *Amir Khan* [1] and *Abdul Hakim Chowdhuri* v. *Hemchandra Das* [2]. It therefore follows that under the Provincial Insolvency Act, it is incumbent upon the party preferring an appeal that he should file copies of the order or judgment appealed against. It is not disputed that in a considerable number of cases such a copy may not be obtainable within the 30 days allowed for presenting an appeal to the First Appellate Court. It was not therefore unreasonably suggested that the legislature could not have intended that the period of 30 days fixed by S. 46, clause 4 should be inclusive of the period taken for obtaining copies of the order appealed against. The result of such a construction would be to deny the right of appeal in many cases. If it were shown in the present case that an application was made immediately after the order was passed and that more than 90 days had elapsed before the copies were obtained I would have hesitated a great deal before coming to the conclusion that the party is not entitled to prefer the appeal after obtaining the copies, because to hold otherwise would be to deny the right of appeal given by the section. However, it has not been shown that in this particular case the copies were not granted expeditiously.

Apart from this particular aspect of the case, the general question now remains whether by virtue of the fact that the Provincial Insolvency Act is not self-contained we are at liberty to introduce into the construction of S. 46, clause 4, the general provisions of the Limitation Act. In *Venkata* v. *Chengadu* [3] a Bench of four Judges had to consider this question with reference to S. 18 of the Limitation Act. That was a case under Revenue Recovery Act. Two Judges, Kernan, J., and Muthusami Ayyar, J., held that S. 18 was applicable to the Revenue Recovery Act, Justices Parker and Wilkinson expressed no definite opinion on the question. In *Seshama* v. *Sankara* [4], Chief Justice Collins and Muthusami Aiyar, J., in dealing with a case under the Madras Boundaries Act XXVIII of 1860 held that S. 14 of the Limitation Act was applicable to the special period

1. (1893) I. L. R. 16 A. 77.
2. (1914) I. L. R. 42 C 438.
3. (1888) I. L. R. 12 M. 168 (F. B.)
4. (1888) I. L. R. 12 Mad. 1.

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fixed in that Act. In *Kullayappa* v. *Lakshmipathi* [1] Kernan and Muthusami Ayyar, JJ., applied S. 14 of the Limitation Act to a case arising under the Rent Recovery Act. In *Iswara Patter* v. *Karuppan* [2] Chief Justice Collins and Justice Davies applied S. 18 of the Limitation Act to a case arising under the Revenue Recovery Act. In *Veeramma* v. *Abbiah* [3], which was a case under the Registration Act all the three learned Judges who took part in it viz., Collins C. J., Muthusami Ayyar, J., and Shephard, J., held that the Act was complete in itself and that consequently there was no occasion for invoking the aid of the general provisions of the Limitation Act. The Chief Justice and Muthusami Ayyar J., once again reiterated the proposition that if the act was not complete in itself, the general provisions of the Limitation Act may be looked into for construing a special Act. On the other hand Shephard, J., gave an interpretation of the term 'affect' which subsequently found favour with the Judges who decided *Abu Backer Saheb* v. *Secretary of State* [4]. All these decisions were passed under S. 6 of the Limitation Act of 1877. There was thus a considerable divergence of opinion regarding the interpretation to be placed upon the word 'affect' at least in Madras, and yet when the new Limitation Act of 1908 was passed, the legislature did not choose to give and authoritative interpretation of the term. My mind has been exercised considerably as to whether the legislature intended to adopt the interpretation placed upon the term by Collins, C. J., Muthusami Ayyar, J., Kernan, J., and Davies, J., or whether it preferred the interpretation placed upon the word by Shephard, J. The opinion of Arnold White, C. J., Miller, J., and Wallis, J., was not given until after the new Act was passed although they had to construe the language of S. 6 of the old Act. The view taken by Shephard, J., is shared by a very large number of Judges in the other High Courts, and as that view is in consonance with the natural interpretation to be placed upon the word 'affect' I prefer to hold with the Judges who decided *Abu Backer Saheb* v. *Secretary of State* [4] that even in cases where the Act is not complete in itself, if by importing the general provisions of the Limitation Act the period fixed in a Special Act is likely to be enlarged either by the process of computation in obtaining copies or by excluding the period during which a fraud was practised or during which another litigation was proceeding in a different court, still the period of limitation would be affected.

1. (1889) I L R. 12 M. 467.
2. (1893) 3 M L J 255.
3. (1894) I. L. R 18 Mad. 99.
4. (1909) I. L R. 34 M. 505.

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It seems to me that this is eminently a matter in which the legislature should interfere. I fail to see why litigants preferring appeals under special Acts should not have the same privilege of extension provided by the general provisions of the Limitation Act as they have in cases directly coming under the Civil Procedure Code. There is no conceivable reason for putting one class of litigants under a disability of this kind. I may also be permitted to suggest that until the legislature intervenes to amend the Limitation Act, our High Court should amend the rule in O. 41 by saying that the presentation of an appeal in cases under the Insolvency Act need not be accompanied by copies of the order, decree or judgment appealed against. My answer is in the negative.

Bakewell, J :—I agree with Mr. Justice Ayling.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER.

Govindasami Pillai ... *Petitioner** (*Petitioner*).

v.

The Municipal Council of Kumbakonum ... *Respondent* (*Respondent*).

Govindasami Pillai v. The Municipal Council of Kumbakonam.

Civil Procedure Code—O. 33 R. 5 (d)—"Cause of action"—Meaning—Application to sue in forma pauperis*—Dismissal on ground of claim being barred by limitation—Jurisdiction—Limitation Act Art, 97 — Applicability — Contract with Municipality for collection of rents of stalls—Deposit in pursuance of—Contract falling through—Suit for recovery of deposit or of balance thereof—Limitation—Starting point.*

The expression "cause of action" in O. 33, R 5 (d) of the code signifies a subsisting cause of action and courts have power to dismiss an application to sue in *forma pauperis* on the ground that the cause of action is incapable of enforcement under the rules of limitation.

"Cause of action" means a "good subsisting cause of action" only in the sense of a valid subsisting cause of action, *i. e.*, one not barred by the laws of jurisdiction or limitation. It does not mean a " good subsisting cause of action" in the sense of a good *prima facie* case on the merits.

A suit for the recovery of the sum deposited by the plaintiff upon a contract with a Municipality for the collection of rents of stalls in a vegetable market or for the recovery of at least the balance due to the plaintiff after crediting a portion of the sum so deposited towards the monthly instalments of rent due from him, is governed by the period of limitation prescribed by Art. 97 of the Limitation Act and must be instituted within 3 years from the date of the contract falling through.

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* C. R. P. No. 887 of 1916. 27th March 1917.

Govindasami Pillai v. The Municipal Council of Kumbakonam.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Principal District Munsif of Kumbakonum, dated the 5th day of February 1916, in O. P. No. 1251 of 1915.

K. Ramachandra Aiyar for Petitioner.

N. Rajagopala Chariar for Respondent.

The Court delivered the following

Judgment:—Upon an application to sue in *forma pauperis* the District Munsif decided that the claim, which was one for return of the balance of the sum deposited by the applicant upon a contract with the Kumbakonum Municipality for the collection of rents of stalls in the vegetable market, was time barred. Upon this ground alone he dismissed the application without hearing evidence and deciding the question of fact whether the applicant was or was not possessed of sufficient means to pay the court-fees on his suit. Two questions have been raised.

1. Whether the District Munsif acted without jurisdiction in dismissing the application on this ground.

2. Whether he was wrong in treating the claim as out of time. Order 33, Rule 5 (d) of the Code of Civil Procedure declares that a court shall reject an application for permission to sue as pauper where the applicant's allegations do not show a cause of action, (in the Code of 1882 it was a right to sue in such court) and Rule 7 (2) authorises the court to hear arguments on the question whether on the face of the application it is prohibited by rule 5.

There is ample authority both under the old Code and the present Code for the view that 'cause of action' in rule 5 (d) signifies a subsisting cause of action and that courts should dismiss applications if the cause of action is incapable of enforcement under the rules of limitation. Vide *Vijendra Tirtha Swami* v. *Sudhindra Thirtha Swami* [1], *Amirtham* v. *Alwar Manikkam* [2] *Subramania Chetty* v. *Malayandi Chetty* [3] and the commentary to this rule in Woodroffe and Ameer Ali's Civil Procedure Code of 1908

But it is argued that *Vijendra Tirtha Swami* v. *Sudhindra Thirtha Swami* [1] was overruled in the Full Bench decision in *Rathnam Pillai* v. *Pappa Pillai* [4] and that the two later cases

1. (1895) I. L. R. 19 M. 197=5 M. L. J. 193.
2. (1903) I. L. R. 27 M. 37.
3. (1914) I. L. W. 668.
4. (1903) 13 M. L. J. 292.

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were decisions of single Judges whose attention was not directed to this Full Bench decision of their own court which put a different interpretation on the language of the Code of Civil Procedure.

This conflict of judicial opinion appears to have arisen principally from the use by different Judges of the words 'good subsisting cause of action' in a different sense.

If it means a good *prima facie* case on the merits, it is reasonable to say that a court would not be justified by anything in O. 33, Rr. 5 and 7 in prejudging the merits of the claim upon a summary investigation in the course of an enquiry into the applicant's pauperism. As stated in *Rathanam Pillai* v. *Pappa Pillai* [1] "a decision of the case on the merits at that stage, in practice, would be likely to lead to waste of the court's time and to confusion and irregularity of procedure."

In this connection I find it impossible to reconcile *Ranganayaka Ammal* v. *Venkatachellapathi Naidu* [2] and *Rathanam Pillai* v. *Pappa Pillai* [1] with *Kamrakh Nath* v. *Sundar Nath* [3] which purported to follow *Chaterpat Singh* v. *Raja Ram* [4] (a case of a claim barred by limitation) but went further and applied the same principles to a case without obvious merits.

If however the words 'good subsisting cause of action' are used to mean a valid subsisting cause of action, *i.e.*, one not barred by the laws of jurisdiction or limitation, then I think that the language of O. 33, R. 5 fully warrants a court rejecting an application which does not satisfy these requirements.

The cases in *Mangaleshri Illath Krishnan Nambudri* v. *Kesavan Nambudri* [5] *Kanakammal* v. *Panchapakesa* [6] and *Devupalli Amanna* v. *Pediradla Narayanasami Naidu* [7] are not exactly in point, but tend to support the distinction I have drawn between causes of action that are not *prima facie* good on their merits and those that are subject to the prohibitions specified in O. 33, R. 5.

The decision in *Venkoba Row* v. *Nataraja Chetty* [8] dealt with a question upon which I do not feel called upon to pronounce an opinion viz., whether evidence could be recorded for deciding on a point of limitation during the enquiry into an applicant's pauperism.

1. (1903) 13 M. L. J 292.
2. (1881) I. L. R. 4 M. 323.
3. (1898) I. L. R. 20 A. 299.
4. (1885) I. L. R. 7 A. 661. (F. B.)
5. (1913) M. W. N 38.
6. (1914) 26 M. L. J. 343.
7. (1915) 30 I. C. 689.
8. (1909) 6 M. L T. 359.

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In the present case no evidence was admitted and the District Munsif held that the suit was barred by limitation on the statements in the plaint. Under O. 7, R. 11 a court could do as much as this even on a duly stamped plaint. On the point of limitation I think that the plaintiff had 3 years to recover his deposit or at least the balance due to him after crediting a portion towards the monthly instalments of rent due from him, from the date of his contract with the Municipality falling through. The article applicable to the facts alleged in the plaint is Article 97, of the Limitation Act which allows 3 years from the date of the failure.

The Privy Council in *Bassu Kuar* v. *Dhum Singh* [1] and this court in *Appavu Odayan* v. *District Board of Tanjore* [2] applied this article to cases where money was paid upon an existing consideration which afterwards failed.

It is clear from *Balakrishnadu* v. *Narayanaswami Chetty* [3] that article 145 which allows 30 years for recovering deposits relates to deposit of goods and not of money. It is true that the Calcutta High Court in *Upendra Lal Mukhopadhya* v. *Collector of Rajshahye* [4] considered that a plaintiff suing for recovery of a deposit given as security for personal services would have 6 years under Article 120 to bring his suit, and this was followed in *Sakhawat Ali* v. *Baldeo* [5] by a single Judge of the Oudh Judicial Commissioner's Court and extended to a deposit of money as security for payment of rent under a contract of lease. But in an earlier decision of the Calcutta High Court *Johuri Mahton* v. *Thakoor Nath Lukee* [6], it was held that the period of limitation for return of money deposited as security for the due performance of a lease was only 3 years under article 62, and I feel no doubt that recourse should not be had to article 120 unless other articles are clearly shown to be inapplicable. As the petitioner in the present case took no steps till 1915 to recover his deposit after getting notice from the Municipality in June 1911 that his lease was cancelled, his claim was rightly treated as time-barred. I dismiss this petition with costs.

A. S. V.

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1. (1888) I. L. R. 11 A. 47 P. C.
2. (1907) 17 M. L. J. 298.
3. (1912) I. L. R. 37 M. 175
4. (1885) I. L. R. 12 C 113.
5. (1910) 8 I. C. 370
6. (1880) I. L. R. 5 C. 830.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER AND MR. JUSTICE KRISHNAN.

Ramakrishna Kukkilaya ... *Appellant** (*2nd Plaintiff.*)

v.

Nekker Kuppanna *alias* Raghavendra Rao and others. ... *Respondents.* (*Defendants*) *2, 1, 3 and 4, and* (*Plaintiffs 1, 3 and 4*).

Ramakrishna Kukkilaya v. Nekker Kuppanna.

Transfer of Property Act, S. 61 — Redemption — Barred debt—Mortgagor not bound to pay, on redeeming subsisting mortgage—Merger—Simple money debt—Conversion of, into mortgage-debt or judgment-debt—Deed—Construction—Charge, creation of—Mortgage and lease, when viewed as parts of the same transaction.

Under a usufructuary mortgage of 1867 the mortgagor agreed to pay the mortgagee at the time of redemption "the consideration amount of the mortgage together with arrears of rent, if any, in respect of the said property if the same is taken on lease by me (the mortgagor) from you (the mortgagee)." The property was taken back by the mortgagor on lease and held by him till 1882 when the mortgagee evicted him and got possession under a decree of Court. For the time the mortgagor was in possession he owed the mortgagee certain arrears of rent The accounts of these arrears were settled in 1873 and again in 1877 and the mortgagee obtained from the mortgagor two simple mortgage deeds for the amounts due till then. The mortgagee had claimed the subsequent rent due in his suit for eviction and had obtained a money decree for it. In 1914 the mortgagor sued for redemption and the mortgagee insisted on payment of the amounts due under the two simple mortgage bonds and also under the decree in his favour. It was found that on the date of the suit for redemption, the mortgagee's right to execute the decree and to enforce the two mortgage bonds had become barred by limitation.

Held that, assuming that all the mortgages over the same property and in favour of one and the same person ought to be simultaneously redeemed, the rule should be confined to cases where the mortgages insisted on being redeemed are enforceable and are not such as are barred by limitation or any other cause from being enforced by suit.

Athan Kutti v. *Subhadra* [1], *Kesar Kunwar* v. *Kashi Ram* [2]. Relied upon.

Per Spencer, J.—The mortgagee having got simple mortgages executed in respect of the arrears of rent on the property usufructuarily mortgaged could not fall back on the security of the earlier usufructuary bond which contained a stipulation for payment of arrears of rent on redemption, as the later mortgages constituted a novation of the original contract.

Per Krishnan, J.—There was nothing more than a mere personal covenant to pay arrears of rent in the original usufructuary mortgage bond and it was not possible to look upon the lease to the mortgagor as part of the mortgage transaction or upon the rent payable under the lease as the interest payable on the mortgage money. and therefore charged on the property equally with the principal sum.

Altaf Ali Khan v. *Lalta Prasad* [3], *Madhwa Siddhanta Onahini Nidhi* v. *Venkataramanjulu Naidu* [4], *Chimmanlal* v. *Bahadur Singh* [5] Referred to.

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* S. A. No. 960 of 1916, 8th, 9th and 23rd August, 1917.

1. (1916) 32 M. L. J. 317.
2. (1915) I. L. R. 37 A. 634.
3. (1897) I. L. R. 19 A. 496.
4. (1903) I. L. R. 26 M. 62.
5. (1901) I. L. R. 23 A. 338.

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The mortgagee's claim for arrears of rent being a simple money debt, became merged in the judgment-debt and the secured mortgage debts obtained by the mortgagee and could no longer be enforced as such.

Velayuda Reddi v. *Narasimha Reddi* [1], *Mahant Prayag Doss Jee Varu* v. *Chengama Naidu* [2] Distinguished.

Second Appeal against the decree of the District Court of South Canara in Appeal Suit No. 296 of 1915 preferred against the decree of the Court of the District Munsif of Udipi in Original Suit No. 36 of 1914.

B. Sitarama Row for Appellant.

K. Ramanatha Shenai and *K. Yegnanarayana Adiga* for the Respondents.

The Court delivered the following

Spencer, J.

Judgments:—*Spencer, J.*:—This suit was brought for the purpose of redeeming a usufructuary mortgage of the year 1867. The mortgagor remained in possession under a lease until 1882 when the mortgagee got into possession. The mortgagee's representatives pleaded in defence of this suit that the plaintiffs were bound to pay off two simple motgages of the years 1873 and 1877 and a decree of 1882 before they could be allowed to redeem the prior usufructuary mortgage. On the points of law arising out of this contention the District Judge, disagreeing with the opinion of the District Munsif, has decided in the defendants' favour.

Now it is clear that by the Limitation Act in force at the institution of this suit if the mortgagees had sued at that time to recover what was due to them on the footing of those simple mortgages their suit would have been time-barred, whereas if the mortgagors sued to redeem them, their suit would not be out of time.

The question then is whether the defendants can set them up in bar of the plaintiff's right of redemption. So far as this presidency is concerned, it must be taken as settled law that a mortgagee having more than one mortgage on the same property can treat each as a separate cause of action and can bring a suit for the recovery of his debt by sale of the mortgaged property on a puisne mortgage subject to his intesest in a prior mortgage (*vide Subramania* v. *Balasubramania* [3], and *Radhakrishna Iyer* v. *Muthusawmy Sholagan* [4],) although it was held in *Dorasami* v. *Venkataseshayyar* [5], that he could not get a sale on the

1. (1916) 32 M. L J. 263.
2. (1916) 4 L. W. 477.
3. (1915) I. L. R. 38 Mad. 927=29 M. L. J. 195.
4. (1908) I L. R 31 Mad. 530.
5. (1908) I. L. R. 25 Mad. 108=11 M. L. J. 373.

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earlier mortgage subject to the later mortgage. Yet when the mortgagor comes to Court and applies for redemption, it has been declared on the strength of S. 61 of the Transfer of Property Act that all the mortgages over the same property and in favour of one and the same person must be simultaneously redeemed. (*Vide Dorasami* v. *Venkataseshayya*[1], and *Balasubramania Nadar* v. *Sivaguru Asari*[2], [approved of by Sadasiva Aiyar, J. in *Subramania* v. *Balasubramania*[3],] and *Ramaswami Ayyar* v. *Vythinatha Ayyar*[4], and *Meloth Kannan Nair* v. *Kodath Kammaran Nair*[5].

In Allahabad this principle was followed in a case where the purchaser of the equity of redemption over a usufructuary mortgage with five subsequent bonds tacked on to it sued to redeem the usufructuary mortgage alone (*Vide Ranjit Khan* v. *Ramdhan Singh*[6]). I think we must assume that this view of the law as to the liability of the mortgagor to redeem all the mortgages outstanding on the same property in favour of the same mortgagee is correct. No doubt there are other considerations to be taken into account against this view. For instance it may be noted that S. 61 of the Transfer of Property Act is silent on the subject of the mortgagor's rights in the case where money is due on a separate mortgage on the same property as that on which he seeks to redeem. Because the section permits one mortgage to be redeemed without redeeming a separate mortgage when the properties are different, does it follow logically that this cannot be done when the properties are the same? Again, if a mortgagor is allowed to pay off one mortgage, the mortgagee would be left with a better security for the remaining debt and it is thus often to the advantage of the mortgagee to accept a partial redemption. Still, assuming the correctness of the decided cases of this Court on the point, the position is altered when there is only one subsisting mortgage and the separate mortgages are no longer enforceable. Where S. 61 speaks of "any separate mortgage" I conclude that it was intended to refer only to subsisting separate mortgages.

In *Athan Kutti* v. *Subhadra*[7] we held that no duty was imposed on a mortgagor of discharging a barred debt before

1. (1915) I. L. R. 25 M. 108 at page 115. 2 (1911) 21 M L J 562
3. (1915) I. L. R. 38 M. 927. 4. (1903) I. L. R. 26 M. 760 at 776.
5. (1913) 1 L. W. 102 at page 105 6. (1909) I. L. R. 31 All. 482.
7. (1916) 32 M. L. J. 317.

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redeeming a mortgage secured by a separate instrument. There is no equity in favour of a mortgagee who sleeps over his rights.

I am now fortified in the opinion that I expressed in that case by the decision of the Allahabad High Court in *Kesar Kunwar* v. *Kashi Ram* [1], that in circumstances similar to those present before us, the mortgagor is entitled to redeem the first usufructuary mortgage without paying the money due on the later simple mortgage at a time when, if the defendant had to sue on the simple mortgage, his suit would have been barred by limitation. That was a stronger case than this, for there was an express covenant in the second mortgage in that case that the plaintiff should not seek to redeem the usufructuary mortgage till he paid the money due on the second bond.

The learned Judges nevertheless observed that in effect the defendant was asking the Court to enforce against this property a stale claim and that this could not be done. Similarly in *Dhondu* v. *Bhikaji* [2], Beaman, J., considered that if a mortgagee allowed a prior mortgage upon the same property as a puisne mortgage to become time-barred he could not revive the prior mortgage by suing upon the puisne mortgage.

A further question of some difficulty has been raised, which is whether the defendants having got simple mortgages executed in respect of the arrears of rent on the property usufructuarily mortgaged, can now fall back on the security of the earlier usufructuary mortgage bond which contains a stipulation that the mortgagor shall pay "the consideration amount of the mortgage together with arrears of rent, if any, in respect of the said property" whenever he requires the land. The lower Courts were of opinion that the later mortgages constituted a novation of contract and that therefore under S. 62 of the Contract Act the original contract need not be performed. On the construction of exhibits III and IV I think the lower Courts were right.

The documents are styled "deeds of further charge." They contain recitals that on the dates when they were executed the parties settled accounts for the arrears of rent that were due till then. On the sums so ascertained there was an agreement to pay interest at a specified rate, and a further agreement that if the

1. (1915) I. L. R. 37 All. 634. 2. (1914) I. L. R. 39 B. 138=17 Bom. L R. 144.

principal and interest were not paid by a certain date, the whole should be recoverable at a higher rate of interest than that first mentioned on the security of the mortgaged property. The debt secured by the usufructuary mortgage (Exhibit I) is expressly excluded from the terms of the settlement. If the mortgagee had sued in time to enforce payment of the money secured by these documents, I do not think it would have been open to the mortgagor to go behind the settlement of accounts and plead that he was only liable under the lease deeds or under the covenant contained in the usufructuary mortgage. The answer to such a plea would have been that the taking of the bonds extinguished the simple contract debts. If these hypothecation deeds (Exhibits III and IV) had been invalid or ineffectual, there would have been no merger of the equitable right of the mortgagee on redemption to have an account taken of the rent due to him on the land usufructuarily mortgaged. But I think they were effectual when they were executed and the intention of the parties was that they should take effect. If these deeds had not been brought into existence, the obligation of the mortgagor to make all payments arising out of his covenants in the usufructuary mortgage deed would have been kept alive till the time of redemption. (See *Parasurama Pattar* v. *Venkatachalam Pattar* 1).

But the mortgagee having deliberately substituted a new liability under Exhibits III and IV for the mortgagor's original liability under his contract of lease, and afterwards through his laches having suffered his rights to become barred by time, his representatives cannot now be allowed to enforce the terms of the original contract any more than the mortgagor could have relied on it if the mortgagee had been in the position of plaintiff.

The appeal must therefore be allowed, the judgment of the lower Appellate Court reversed with costs in that Court and this, and the decree of the District Munsif restored. Time for redemption is extended for four months from this date.

Krishnan, J.

Krishnan, J. :—This Second Appeal arises from a suit to redeem a usufructuary mortgage of 1867 Exhibit I on payment of the principal amount secured less certain damages for waste. The question of damages has now been set at rest against the plaintiffs. Though the mortgage was one with possession, the property was taken back by the mortgagor on lease and held by

1. (1913) 25 M. L. J. 561.

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him till 1882 when he was evicted under the decree Exhibit II and since that date the mortgagee has been in possession. For the time the mortgagor was in possession he owed the mortgagee certain arrears of rent after deducting payments made by him from time to time. The accounts of these arrears were settled in 1873 and again in 1877 and the mortgagee obtained from the mortgagor two simple mortgage deeds, Exhibits III and IV for the amounts due. The mortgagee had included the subsequent rent due in his suit for eviction and had obtained a money decree for it. In this manner all the rent due had been accounted for. It is admitted that the mortgagee's right to execute the decree and to enforce the two bonds, Exhibits III and IV by suit is now barred by limitation.

On these facts the dispute between the parties is whether redemption should be allowed on payment of the principal money alone as contended for by plaintiffs or whether the amounts due under Exhibits II, III and IV should also be paid to the mortgagors as contended for by them. The District Munsiff decided in favour of the mortgagor holding that the mortgagee's claim for arrears of rent had become merged in the decree and the two bonds II, III and IV and as these were unenforceable at the date of suit the mortgagor was not bound to pay anything as amounts due under the said decree and bonds or as arrears of rent. On appeal the District Judge while agreeing with the Munsiff on the question of merger held that the mortgagor was bound to redeem the two mortgages III and IV along with Exhibit I as they were all between the same parties and on the same property relying on *Dorasami* v. *Venkataseshayyar* [1] and *Balasubramania Nadar* v. *Sivaguru Asari* [2] and that as defendant was setting up these two later mortgages as a defence to the suit, it did not matter that his suit to enforce them would be dismissed as time-barred, as the Limitation Act applied only to suits and not to defences. For the latter position he relied on the cases reported in *Krishna Menon* v. *Kesavan* [3] and *Subrahmania Ayyar* v. *Poovan* [4]. He therefore directed the mortgagor to pay the amounts due under Exhibits III and IV as well but disallowed the amount of the decree Exhibit II.

Against this decree the 2nd plaintiff, one of the representatives of the mortgagor, has appealed to us. His learned Vakil contended before us that there is no rule requiring the mortgagor to

1. (1901) I. L. R. 25 M. 108.
2. (1911) 21 M. L. J. 562.
3. (1897) I. L. R. 20 M. 305.
4. (1902) I. L. R. 27 M. 28.

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redeem all the mortgages on a property in one and the same suit and that even if there is such a rule it should not be applied in the case of mortgages which have become unenforceable by lapse of time.

The learned Advocate for the respondents has urged that the District Judge's view on both the above points was correct but that his opinion on the question of merger was erroneous and that if his clients could not rely on Exhibits III and IV they were entitled to fall back upon their rights under Exhibit I and under that deed they were entitled to have an account taken of the rents due and the amount arrived at paid along with the mortgage money.

On the first question raised, whether a mortgagor should be compelled to redeem all the mortgages on a property in favour of the same mortgagee in the same suit it is not necessary in this case to give a decision in the view I am taking on the 2nd question raised; for even assuming that there is a rule as contended for by the mortgagee I agree with my learned brother that it should be confined to cases where the mortgages insisted upon being redeemed are enforceable ones and are not such as are barred by limitation or any other cause from being enforced by suit. This view has already been laid down by Sir W. Ayling, J. and my learned brother in *Athan Kutti* v. *Subhadra* [1], and a similar view was held in *Kesar Kunwar* v. *Kashi Ram* [2]. It will not be equitable to allow a rule like the one in question, which is after all a rule of equity, to be used to enable a person to enforce a stale claim indirectly when he could not enforce it directly by suit. The question is not, as the District Judge has conceived it, a question whether a defendant in possession should be allowed to set up a barred defence to protect his possession but a question whether the rule should be allowed to be used as a means for compelling payment of barred mortgage debts. The mortgagee is not entitled to any possession under the two mortgages Exh. III and IV. As in the present case the property is directed to be sold if all the moneys due to the mortgagee is not paid the result is, if the decree stands, the mortgagee will get paid what is due on his barred mortgages as well. The suit for possession is not dismissed for non-payment of the amounts of the barred mortgages; so they do not form a defence to defendant's possession. I think therefore

1. (1916) 32 M. L. J. 817. 2. (1915) I. L. R. 37 All 634.

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the principle laid down in the rulings cited by the District Judge in *Krishna Menon* v. *Kesavan* [1], and *Subrahmania Ayyar* v. *Poovan* [2], does not apply at all to this case. I agree that defendants are not entitled to insist on their claims under Exhibits III and IV being paid up on redemption.

Mr. Shenai for the respondents then raised the question that his clients were entitled to fall back upon their rights under Exhibit I for payment of arrears of rent. As stated before, it is for these very arrears that Exhibits II, III and IV were obtained by the mortgagee and the lower Courts have held that the claim for such arrears had become merged in those bonds and the decree so that the claim could no longer be enforced as a claim for arrears of rent. The question is important because there is a clause in the original mortgage deed Exhibit I which says "I (the mortgagor) shall pay you (the mortgagee)......the consideration amount of the mortgagee together with any arrears of rent if any if in respect of the said property if the same is taken by me on rent under you," *i.e.* at the time of redemption. If there is no merger of the claim for arrears of rent this covenant will enable the mortgagee to claim the amount of arrears against the mortgagor at the time of redemption irrespective of any questions of limitation.

Mr. Shenai's argument against applying the doctrine of merger in this case is that his clients had already got a charge on the property for the rent when they took Exhibits III and IV as deeds of further charge and that charge should be deemed not to have been abandoned when the fresh securities were taken as the latter were not of a higher character; and he cited Halsbury's Laws of England, Vol. 21, Ss. 579 and 581 and Fisher on Mortgages, Ss. 1554 to 1560 and the cases in *Velayuda Reddi* v. *Narasimha Reddi* [3], and *Mahant Prayag Doss Jee Varu* v. *Chengama Naidu* [4] in support of his proposition that the taking of a fresh security for an already secured debt when that security is not of a higher character does not lead to a merger of the original rights. To succeed in this argument we must be satisfied that the mortgagee had a charge on the property for rent, to start with. This charge was claimed in 2 ways and I shall now consider them.

1. (1897) I. L. R. 20 M. 305
2 (1902) I. L. R. 27 M. 28.
3. (1916) 32 M. L. J. 263.
3. (1916) 4 L. W. 477.

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It was first urged that the provision in Exhibit I by which the mortgagor undertook to pay any arrears of rent due along with the mortgage money at the time of redemption, itself created a charge.

I am unable to accept this argument. I think the words do not amount to any thing more than a mere personal covenant to pay. There are no appropriate words to create a charge. In a somewhat similar case Sargent C.J, and Kemball, J., held that no charge was created, see *Hari Mahadaji Savarkar* v. *Balambhat Raghunath Khare* [1]. Their view was followed in *Yashvant Shenvi* v. *Vithoba Shetti* [2] and by this High Court in *Unni* v. *Nagammal* [3]. I hold no charge was created by the wording of Exhibit I as urged.

It was next contended that the mortgage Ex. I and the lease to the mortgagor should be looked upon as one and the same transaction and the rent payable under the latter treated as in reality to be the interest payable on the mortgage money and therefore charged on the property equally with the principal sum. Such an argument was accepted in the case of *Altaf Ali Khan v. Lalta Prasad* [4] and *Madhwa Sidhanta Onahini Nidhi v. Venkataramanjulu Naidu* [5], but was rejected in *Chimman Lal* v. *Bahadur Singh* [6]. As was pointed out in the earlier Allahabad case and emphasized in the latter one "each case has to be decided on its own peculiar circumstances" regarding this point. Where *prima facie* a mortgage and a lease are two distinct transactions the person alleging that they are one must prove it. I do not think there are circumstances here which would prove that the lease to the mortgagor was a part of the mortgage arrangement itself. Ex. I seems to show that an immediate lease at the same time as the mortgage was not contemplated as it speaks only of a possible future lease. We do not know as a matter of fact when the 1st lease was taken as no lease deed has been produced. The schedule in Exhibit II would seem to show that several leases were given one after another ; two of them are referred to in it as having been filed as Exhibits B and C in that suit We do not know the rent fixed and whether it was equal to the interest on the mortgage money. The motgagee sued for the rent under the lease as lessor in his

1. (1884) I. L R 9. B. 233.
2. (1887) I. L. R. 12 B. 231.
3. (1895) I L. R 18 M. 368.
4. (1897) I. L. R. 19 A. 496.
5. (1903) I. L. R 26 M. 662.
6. (1901) I L. R. 23 A. 338.

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suit which resulted in Exhibit II. If the parties intended that the rent should be looked upon as interest and thus charged on the property it is not likely that they would have taken the trouble to get two new deeds, Exhibit III and IV executed and registered for creating a charge for that very rent. I think the usual indications for treating the two transactions as the same are wanting here; but on the other hand the circumstances point the other way. The claim for a charge on this ground also must be disallowed.

In these circumstances it is clear that at the time the mortgagee obtained the decree and the two simple mortgages his claim for arrears of rent was a simple money debt. There can be no doubt that the conversion of a simple contract debt as in this case into a judgment debt and secured mortgage debts clearly causes a merger; see Halsbury, Volume 21, S. 578, and Fisher on Mortgages S. 1574. The two cases cited in *Velayuda Reddi* v. *Narasimha Reddi* [1], and *Mahant Prayag Doss Jee Varu* v. *Chengamma Naidu* [2], were both cases where the original debts themselves were secured debts so that the presumption that a man intends what is for his benefit led to an inference against the merger. There is no scope for such an inference when a simple money debt is converted into a secured debt.

There is here no indication of any intention to keep the original debt alive. I am therefore of opinion that the Lower Courts were right in holding that the defendants' claim for arrears of rent had merged in Exhibits II, III and IV and could no longer be enforced as for such arrears. The covenant in Exhibit I cannot be made to apply as there are no arrears of rent existing as such.

It follows that the plaintiffs are entitled to redeem on payment of the principal amount secured under Exhibit I. In the result I agree that the appeal must be allowed and the decree of the District Judge reversed and that of the District Munsif restored with costs here and below.

Time for redemption is extended for four months.

A. V. V.

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1. (1916) 32 M. L. J. 263. 2. (1916) 4 L. W. 477.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE PHILLIPS.

C. S. Parameswara Ayyan ... *Appellant** (*2nd Plaintiff.*)

v.

Kittunni Valia Mannadiar *alias* Puthunana Panikkar and another. *Respondents* (*Defendants Nos. 1 and 6.*)

Paramesara Ayyan *v.* Kittunni Valia Mannadiar.

Malabar Compensation for Tenants Improvements Act (I of 1900), S. 5—Tenant to whom "compensation is so due"—Meaning—Tender of mortgage amount into Court—Amount found to sufficiently cover compensation for improvements—Liability of mortgagee-tenant for mesne profits from date of tender—Statute—Interpretation—Principles—Reasonableness or otherwise of construction—Object and Preamble of Act—Proceedings in Legislative council—Reference to—Legitimacy of—Condition.

Compensation for improvements remains due to the tenant within the meaning of S. 5 of the Malabar Improvements Act (I of 1900) till he is actually paid or (if he would not take it though tendered or paid into court) till he is ejected in execution of a decree or order of court [after the payment of the amount into court in pursuance of an order under S. 6 (1) and (3) of the Act].

Held, therefore that a mortgagee-tenant to whom the Malabar Compensation for Tenants' Improvements Act applied was not bound to pay mesne profits from the date of tender of the amount due under the mortgage into court even when it was found that the money so tendered sufficiently covered the compensation for improvements, *Chami* v *Anni Pattar* [1] not folld

Per Sadasiva Aiyar, J.:—The question of unreasonableness of construction is relevant in considering the meaning of a statutory provision only where the language is reasonably capable of two constructions, one reasonable and the others unreasonable and not where it is quite plain.

Where, however, there is some ambiguity in an Act, the preamble and the object of the Act can be referred to. In such a case reference may also be made to the proceedings connected with the Act in its passage through the legislature. Where the language of the Act is quite plain reference cannot be made to such proceedings.

The Administrator General of Bengal v. *Prem Lal Mullick* [2] distinguished.

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 767 of 1914 preferred against the decree of the Court of the District Munsif of Palghat in O. S. No. 342 of 1913.

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar* for Appellant.

C. V. Ananthakrishna Aiyar for Respondent.

The Court delivered the following

Judgments:—*Sadasiva Aiyar, J*:—The 2nd plaintiff in this suit for redemption is the appellant before us. The two questions

Sadasiva Aiyar, J.

* S. A. No. 418 of 1916. 31st August, 1917.

1. (1916) M. W. N. 160.

2. (1895) I. L. R. 22 C. 788 (799 800) P. C.

Parameswara Ayyan v. Kittunni Valia Mannadiar.

Sadasiva Aiyar, J.

for consideration are, (1) whether a mortgagee tenant to whom the Malabar Compensation for Tenants' Improvements Act applies is bound to pay mesne profits from the date of tender of the amount due under the mortgage into court when it was found that the money so tendered sufficiently covered the compensation for improvements also, (2) Whether the 2nd plaintiff melcharatdar is under the circumstances of this case entitled to his costs.

The answer to the first question depends entirely upon the construction to be placed upon sections 5 and 6 of the Malabar Improvements Act (I of 1900) and especially S. 5. Omitting the words immaterial for our purpose, S. 5 is as follows:— (1) "Every tenant" (which includes a mortgagee in possession) "shall on ejectment be entitled to compensation for improvements for which compensation *has not already been paid*; and every tenant to whom compensation *is so due* shall be entitled to remain in possession *until ejectment in execution of a decree or order of court*". (2) "A tenant" (Mortgagee) "so continuing in possession shall during such continuance, hold as a (mortgagee)" "tenant *subject* to the terms of his mortgage".

I think the language is plain that till compensation is actually paid (mere tender not sufficing) the mortgagee remains in possession as mortgagee (not as trespasser or trustee) notwithstanding a valid tender. It is not difficult to find reasons for this exceptional favouring of the Malabar tenants by the legislature there being other such exceptional provisions in the Act, such as the re-opening of decrees in execution in the matter of compensation for improvements, the allowing of a mortgagee or tenant to continue to make improvements notwithstanding the passing of a decree and so on. Mr. Ramachandra Aiyar, the learned Vakil, for the appellant relied on the decision of two learned Judges of this court (Coutts Trotter and Seshagiri Aiyar, JJ.) reported in *Chami* v. *Anu Pattar* [1]. With the greatest respect, I am unable to agree with that decision. In the judgment of Coutts Trotter, J., S. 5 is quoted but without the reproduction of the clause "*for which compensation has not already been paid.*" That learned Judge was not inclined to adopt the literal construction of the section, because he thought that that was "a wholly unreasonable construction of the Act and would permit wholly unreasonable conduct on the part of the tenant". Mr. Justice Seshagiri Aiyar, says that "under S. 5

1. (1916) M. W. N. 160.

Parameswara Ayyan v. Kittunni Valia Mannadiar.

Sadasiva Aiyar, J.

Cl. 2, the tenant is bound to pay the mesne profits". As far as I could see, under Cl. 2 he is not bound to pay the mesne profits but only the purapad mentioned in the kanom mortgage. Even in a previous portion of the learned Judge's judgment, he says that where the mortgage money has been tendered and where the relation of landlord and tenant subsists between the parties, "the liability to pay mesne profits" to the landlord also subsists. Of course, rent is usually paid out of the mesne profits (though rent may have to be paid even if the tenant is unable to obtain any mesne profits) and probably that is what the Judge means in the former portion of his judgment about mesne profits being payable to the landlord, mortgagor. The question of unreasonableness of construction is relevant in considering the meaning of a statutory provision, only where the language is reasonably capable of two constructions, one reasonable and the other unreasonable (see Maxwell on the Interpretation of Statutes, Chapter VIII). Supposing, however, there is some ambiguity in an act, then the preamble and the object of the Act can be referred to as has been done by the Privy Council recently in the Urlam Case, *Kandukuri Balasurya Prasada Row* v. *Secretary of State for India* [1]. In *Administrator General of Bengal* v. *Premlal Mullick* [2], their Lordships of the Privy Council state that the proceedings of the legislature which resulted in the passing of an act, cannot be referred to as legitimate aids to the construction of a particular section which was construed in that case. In that case, however, the language according to their Lordships of the Privy Council, was quite plain. As I said already the language of S. 5 seems to be quite plain. In a case which I recently decided sitting with Mr. Justice Spencer (A.A. A. O. No. 123 of 1914) where mesne profits were claimed on the ground that the money had been paid into court, I stated, quoting clause 1 of Sec 5 as also clause 2, that mortgagee is not liable for mesne profits as a trespasser because till actual ejectment in execution of the decree of court, he continues to be mortgagee. In the case of *Kanaran* v. *Chiruta* [3], it was held that the rights of a purchaser in execution of a mortgage-decree under the Transfer of Property Act cannot prevail against the right of a subsequent tenant under the mortgagor to be paid his compensation for improvements before ejectment. Assuming for

1. (1917) 33 M. L. J. 144 (P.C.)
2. (1895) I.L.R. 22 C. 788 at p. 799 and 800 (P.C.)
3. (1914) I. L. R. 38 M. 954=26 M. L. J. 183.

Parameswara Ayyan v. Kittunni Valia Mannadiar.

Sadasiva Aiyar, J.

a moment that the language of section 5 is not plain, Maxwell at page 43 quotes a Privy Council case in which their Lordships referred to a portion of the proceedings connected with a Statute in its passage through the legislature for interpreting an ambiguous expression contained in it. Their Lordships referred to the introduction of a proviso by the Lords in the Act (*i. e.*, Uniformity Act, 13 & 14 Car, II c. 4) and its rejection by the Commons and to the reasons assigned by the latter for the rejection as an indication of the intention of the legislature. Now when S. 5 of the Act was before the Legislature, the Hon'ble M. R. Ry. P. Ratnasabapathy Pillai wanted to amend Section 5 by adding after the words "is so due" the words "but is not tendered" so that if that amendment be made, the tenant would not be entitled to possession after such tender and would not be entitled to remain in possession as tenant or mortgagee until ejectment in execution of the decree of court. In moving this amendment, he said "the object of my amendment is to provide for cases in which reasonable compensation might be tendered by the landlord to the tenant and the tenant chooses to refuse the compensation so tendered. Even in such a case the tenant might contend, as *the section stands* that the compensation is still *due* to him and on that ground he may insist upon continuing in possession till he is evicted by court's decree or order. I did not think that such is the intention of the select committee which drafted this portion. I think it is better to make the meaning clear. If a resonable compensation is offered by the landlord to the tenant and if the tenant chooses to refuse it, he does so at his peril." These words "he does so at his peril" occur also in the judgment of Coutts Trotter, J., in *Chani* v. *Anu Pattar* [1]. The Honourable Mr. Bashyam Iyengar replied in the Legislative Council "I may state that this point was very anxiously and carefully considered in the Select Committee and if it were feasible to practically give effect to the suggestion made by the Honourable Mr. Ratnasabapathy Pillai, it would have been done. But the ascertaining of the amount of compensation under the provisions of this Bill is so intricate that it is impossible for either party to ascertain it, but both the landlord and the tenant may mutually agree as to the amount, which case is provided for by the priviso to Sec. 19. It is impossible for the landlord to know what amount to tender and it is still

1. (1916) M.W.N. 160.

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more impossible for the tenant to know whether the amount tendered by the landlord is the amount that he is entitled to on eviction. But so long as the parties do not agree as to the amount, the insertion of the words proposed in S. 5 will be one which would give rise to great complication and *the result will be that the tenant might lose the value of the improvements effected by him since the date of the tender*. The tenant might have *bona fide* considered that the amount tendered as insufficient, but it may turn out that when the improvements are valued the amount tendered was correct or was more than the amount found on calculation......... ....*Therefore I submit that while my honourable friend's suggestion is sound in principle and in theory yet having regard to the peculiar nature of this Act and the peculiar custom of Malabar and the difficulty of ascertaining the amount of compensation due when the parties do not amicably settle it, the insertion of any such words as those proposed in this section will, to a great extent, defeat the object of this Bill*". Then the amendment was put to the Council and lost. I think the Legislature clearly intended that the amount shall remain *due* to the tenant till he is actually paid or (if he would not take it though tendered or paid into court) till he is ejected in execution of a decree or order of court (after the payment of the amount into court in pursuance of an order under S. 6 (1) and (3)). The first question is therefore decided against the appellant.

The second point, namely, the question of costs, follows the finding on the first point, and even if the first point had been decided in the appellant's favour, it being clear from the 27th paragraph of the first Court's judgment that the parties were in dispute as to whether one of the taks in plaint item No. 6 was or was not included in the mortgage and it having been found that it was not so included and that the plaintiff's claim to redeem that tak was therefore unsustainable, the order of the first court directing the parties to bear their respective costs can be fully supported on this ground.

In the result, the second appeal wholly fails and is dismissed with costs.

Phillips, J:—I agree.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE OLDFIELD.

C. Streeramulu Naidu ... *Appellants* (Plaintiff).*

v.

T. Ramaswami Mudaliar and others ... *Respondents (Appellants)*

Streeramulu Naidu *v.* Ramaswami Mudaliar.

Registration Act III of 1877, Ss. 3, 17 and 49—Unregistered agreement to lease—Suit for specific performance, damages—Document inadmissible in evidence—Evidence Act, S. 91, effect of.

A suit for specific performance with a claim for damages in the alternative, was instituted on foot of an unregistered agreement executed by the defendant, the material portion of which was as follows :—"Received advance from C. (plaintiff) one hundred rupees for giving a lease of 1¾ grounds for 25 years at Rs. 3/8 a month." *Held* that the suit should be dismissed. The document though in form, a receipt for an advance of rent, was in substance an agreement to lease, and being unregistered, was itself inadmissible in evidence and was also a bar to the reception of evidence *aliunde* both as regards the claim for specific performance and the claim for damages. *Narayana Chetti* v *Muthiah Servai.* followed.

Per Oldfield, J.—The question of admissibility of a document like the one sued upon, ought to be dealt with according as it is or is not the record which the parties may be supposed to have prepared for future use in case it should be necessary to ascertain the terms of the agreement between them; and the circumstances in each case will therefore be, to some extent, material.

On appeal from the judgment of the Honourable Mr. Justice Coutts Trotter in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 347 of 1915.

C. V. Ananthakrishna Aiyar and *P. V. Ramachandra Raju* for Appellant.

V. V. Srinivasa Aiyangar, S. Ponnusami Aiyar, K. Narayanaswami Iyer and *Mahomed Ibrahim Saheb* for Respondents.

The Court delivered the following

Wallis, C. J.

Judgment :—*Wallis, C. J.*:—This is an appeal from a judgment of Mr. Justice Coutts Trotter in an action for specific performance, dismissing the plaintiff's suit without calling on the defendant. Mr C. V. Ananthakrishna Aiyar has argued that the evidence for the plaintiff made out a *prima facie* case. On the other hand Mr. V.V. Srinivasa Aiyangar for the 2nd respondent has contended that the learned Judge was wrong in admitting as evidence Exhibit A which he contended is an unregistered agreement for a lease and inadmissible for want of registration. He also argued that, as in it the terms of the contract between the parties have been reduced to writing, no other evidence can be given of the contract under S. 91 of the Indian Evidence Act. We are of opinion that these contentions must be upheld.

* O. S. A. No. 38 of 1916. 28th March 1917.

1. (1910) I. L. R. 35 M. 63.

Streeramulu Naidu v. Ramaswami Mudaliar.

Wallis, C. J.

As regards the question whether Exhibit A amounts to an agreement for a lease, we think that the substance rather than the form of the document must be regarded.

It is not at all uncommon in this country for agreements to sell or to lease to take the form of a receipt for a deposit on account of purchase money or of an advance for rent. Agreements which took the form of a receipt have been held inadmissible in *Narayanan Chetty* v. *Muthiah Servai* [1], and *Sreekishan Chetty* v. *Kota Namalwarayya* [2]. Exhibit A is in the following terms:— "Received advance from C. Streeramulu Naidu or order Rupees one hundred only for giving 1¾ lease (which is explained by the evidence as a lease of 1¾ grounds) land of Mr. Rajagopalachariar after the expiry of the present lease to him for 25 years, rent at Rs. ⅝ month". The demised premises appear to be sufficiently capable of identification and the term and rent are also mentioned. On the whole, we have come to the conclusion that though in the form of a receipt, this document Exhibit A embodies the terms of an agreement to grant a lease on the terms therein mentioned, in addition to a receipt for a deposit of Rs. 100 an advance on account of rent.

According to the decision of the Full Bench in *Narayanan Chetty* v. *Muthiah Servai* [1], an unregistered agreement for a lease is inadmissible in a suit for specific performance. It has been argued by Mr. C. V. Anantakrishna Aiyar that that decision is not only opposed to the decision of an earlier Full Bench in *Raja of Venkatagiri* v. *Narayana Reddi* [3], but also to the view which had been taken in some other courts as in *Basanta Kumari Debi* v. *Midnapur Zamindari Co.* [4]. That decision, however, has now stood for nearly 7 years and we think must be taken as settling the question so far as this court is concerned and we are not prepared to re-agitate the question by a further reference to Full Bench. If this be the case, it follows that S. 91 of the Evidence Act forbids any other evidence being given of the agreement to lease which is sued upon. That disposes of the claim for specific performance.

Mr. C. V. Anantakrishna Aiyar, however, has raised another objection and has argued that although under the decision of the Full Bench in *Narayanan Chetty* v. *Muthiah Servai* [1] the plaintiff is precluded from obtaining specific performance for want of a

1. (1910) I. L. R. 35 M 63=21 M. L. J. 44.
2. (1915) 29 I. C. 246
3. (1894) I. L. R. 17 M. 466=4 M. L. J. 198.
4. (1915) 19 C. W. N. 347.

Streeramulu Naidu v. Ramaswamy Mudaliar.

Wallis, C. J.

registered agreement, he still has his right to damages, and he has relied upon the decision of the earlier Full Bench in *Rajah of Venkatagiri* v. *Narayana Reddi*[1] which no doubt is expressly to that effect. After very carefully considering the question, we think that the contrary view necessarily follows, from the view taken by the more recent Full Bench in *Narayana Chetty* v. *Muthiah Servai* [2] and that, if the view taken by that Full Bench is to be accepted as regards suits for specific performance, the necessary consequences should be accepted as regards suits for damages. S. 49 of the Registration Act prohibits the document from being received "as evidence of a transaction affecting immoveable property." The transaction affecting property, if it does not affect it, is the agreement to lease. Therefore the section in this view prohibits the document from being given in evidence of the agreement to lease, and it seems to us that it prohibits it equally whether the claim be for specific performance or for damages. It appears to be the logical result that the claim for damages must also fail, if the view taken by the more recent Full Bench be adhered to, and as I have already said, we are not prepared to re-open that question.

In the result the appeal fails and will be dismissed with costs of the 2nd respondent.

Oldfield, J.

Oldfield, J.—I should like to add that the question of admissibility of a document, such as Exhibit A, ought in my opinion, to be dealt with according as it is or is not the record which the parties may be supposed to have prepared for future use in case it should be necessary to ascertain the terms of the agreement between them; and that the circumstances in each case will therefore be, to some extent, material. Here we find that Ex. A is propounded by plaintiff as having been passed to him, when the agreement on which he now sues was made. It was passed directly as a receipt for the advance which was paid under that agreement. But it does also contain a full record of the terms of the agreement and it seems to me that, in the circumstances, it was meant for future use as a record of such terms and that case is therefore one in which the document must be taken as embodying the agreement and must be registered. In those circumstances it seems to me that, being unregistered, it is inadmissible.

On the other points I entirely agree.

A. V. V.

1. (1894) I. L. R. 17 M. 156. 2. (1910) I. L. R. 35 M. 63 at 65.

Sethurama Aiyangar v. Subbiah Pilli.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE SRINIVASA AIYANGAR.

Sethurama Aiyangar ... *Appellant** (*Defendant*).

v.

Subbiah Pillai and another ... *Respondents* (*Plaintiffs*).

Jurisdiction—Civil and Revenue Court—Suit by tenant contesting Landlord's right of sale for arrears of rent—Objections to validity of contract not covered by S. 26 of the Madras Estate Land Act.

A Revenue Court exercising jurisdiction under the Madras Estates Land Act is entitled to hear and adjudicate on objections (other than those specified in S. 26 of the Act) to the validity of a Contract under which a ryot claims to hold the holding at a rent less than the ordinary or lawful rent payable on the land.

If the Court has jurisdiction to determine a matter, it must have jurisdiction to decide all questions necessary for that determination.

Second appeal against the decree of the District Court of Madura in A. S. No. 199 of 1914 preferred against the decree of the Deputy Collector, Melur Division in Summary Suit No. 17 of 1914.

A. Krishnaswami Aiyar for Appellant.

C. S. Venkatachariar for Respondents.

The Court delivered the following

Judgment :—The question which arises for decision in this appeal is whether a Revenue Court exercising jurisdiction under the Estates Land Act is entitled to decide objections, (other than those specified in Sec. 26 of the Act), to the validity of a contract under which a ryot claims to hold the holding at a rent less than the ordinary or the lawful rent payable on the land. The landlord is an office-holder in a temple and the lands or rather the revenue constitutes the manyam attached to the office. A predecessor of his received Rs. 200 from the ryot and agreed to allow him, remission of five-eighths of the assessment in perpetuity. The present office-holder claims the full rent, declines to be bound by the agreement and contends that his predecessor who owned the Manyam as an office-holder cannot bind his successor by such an agreement. The question arises in a suit brought by the tenant contesting the landlord's right of sale under Section 112 of the Act. The learned District Judge in appeal declined to go into the question as he thought that that question was competent only to an ordinary Civil Court.

* S. A. No. 1323 of 1915. 21st March 1917.

Sethurama Aiyangar v. Subbiah Pillai.

We are unable to agree with him. For deciding whether the landlord is entitled to sell the holding the court must find whether any arrears of rent are due and for this purpose, it must decide what the rent or rate of rent is. The rent or rate of rent cannot be determined without considering for the purpose of the suit whether the contract granting the remission is valid. Sec. 26 assumes that the contract except as affected by the provisions of the section is valid. If the existence or the validity of the contract is questioned that must be first determined before the provisions of sec. 26 are applied If the court has jurisdiction to determine a matter, it must have jurisdiction to decide all questions necessary for that determination. If a previous judicial rescission is necessary before the contract could be repudiated, it may be that the Revenue Court would be bound to give effect to the contract subject only to the provisions of Sec. 26; but the landlord in this case was not a party to the contract and denies the authority of his predecessor to bind the successor.

In *Raja of Pittapur* v. *Sreerama Charyulu* [1] the Raja of Pittapur sued a ryot in the ordinary Civil Court and prayed for declaration, (i) that the contract of his predecessor granting remission to the ryot was not binding on him, (ii) that the proper rent was Rs. 500 a year and prayed for the recovery of arrears of rent. Objection was taken to the jurisdiction of the Civil Court to entertain the suit on the ground that a suit to determine the rent and for recovery of arrears was exclusively cognizable by the Revenue Court and that the declaration as to the invalidity of the contract was only ancillary to the main reliefs. This contention prevailed in the first court, but in appeal here the plaintiff withdrew his last two prayers, and this court held that the prayer for declaration of the invalidity of the agreement was not ancillary but was substantial relief and on that ground held that the Civil Court had jurisdiction. No doubt was entertained that the Revenue Court would have jurisdiction to decide on the validity of the contract if the matter arose incidently, for determining the rate of rent. We must therefore reverse the decreee of the Lower Appellate Court and remand the appeal for disposal according to law. Costs to abide.

A. V. V.

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1. (1911) 2 M. W. N. 307.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE KUMARASWAMI SASTRI.

Sowbagia Ammal ... *Appellant** (*Plaintiff Petitioner*).

v.

Manicka Mudaliar and others ... *Respondents* (*Defendants-Respondent*).

Sowbagia Ammal v. Manicka Mudaliar.

Hindu Law—Widow—Maintenance—Charge—Decree charging specified items of family property—Realisation of arrears of maintenance in execution.

Though a Hindu widow has a right to ask the court to charge any maintenance it might decree for her, on the property of the joint family, she has no charge on the whole or any specified item of that property till the decree declares it.

Where however a decree directs the maintenance of a Hindu widow to be paid out of the joint family property and confines the charge to certain items of such property, the widow is entitled to realise the arrears of maintenance due to her by attachment and sale of the properties so charged, in execution of the decree.

Appeal against the order of the District Court of South Arcot dated the 6th day of July 1916 in E. P. No. 4, E. P. R. No. 25 of 1916 in O. S. No. 44 of 1911.

C. V. Anantha Krishna Aiyar for Appellant.

T. R. Venkatarama Sastri for Respondents.

The Court delivered the following

Judgment:—The appellant obtained on the 30th September 1913 a maintenance decree in O. S. No. 44 of 1911 directing the defendants to pay her maintenance at Rs. 50 a month and charging the same on the properties specified in the plaint. On appeal the High Court modified the decree by substituting for the personal decree a decree making the maintenance payable out of the joint family properties in the hands of the defendants and by confining the charge to items 4 to 25, of the plaint. She applied to execute the decree by attachment and sale of certain items charged with the maintenance. The judgment debtors objected on the ground that the decree holder can only proceed by a separate suit and the District Judge following *Aubhoyessury Dabee* v. *Gouri Sunkur Pandey* [1] and *Venkatasubbamma* v. *Venkanna* [2] upheld their contention and while granting the prayer for attachment, was of opinion that a separate suit for sale was necessary.

* C. M. A. No. 264 of 1916. 10th September 1917.

1. (1895) I. L. R. 22 C 859.
2. (1907) 17 M. L. J. 217.

Sowbagia Ammal *v.* Manicka Mudaliar.

We do not think that the order of the District Judge can be supported. Both the decisions referred to by him proceeded on S. 99 of the Transfer of Property Act which provided that "where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under S. 67." S. 99 of the Transfer of Property Act has bean repealed and has been re-enacted as Rule 14 of Order 34 of the Civil Procedure Code. The words " whether arising under the mortgage or not " in S. 99 of the Transfer of Property Act have been omitted and the operation of the prohibition is confined to a " decree for the payment of money in satisfaction of a claim under the mortgage''. The effect of the change is that the mortgagee can have the mortgaged property sold in execution of a decree on a claim unconnected with the mortgage. *Tarak Nath Adhikari* v. *Bhubhaneswar Mitra* [1].

Having regard to the important change introduced by Order 34 Rule 14 we do not think that a separate suit is necessary where a Hindu widow seeks to execute a decree for maintenance which is charged on certain properties by sale of the properties charged. Though a widow has the right to seek the Court to charge any maintenance it might decree on the property of the family, there is no charge on the whole or any specified item till the decree declares it. *Ram Kunwar* v. *Ram Dei* [2], *The Bharatpur State* v. *Gopal Dei* [3], *Manika Gramani* v. *Ellappa Chetti* [4]; *Lakshman Rama Chandra Joshia* v. *Satyabama Bai* [5], *Raja Braja Sunder Deb* v. *Sarat Kumari* [6], *Digambar Debi* v. *Dhan Kuwar Debi* [7]. See also Mayne's Hindu Law, paragraphs 460 to 463.

We do not, therefore, think that prior to a decree charging maintenance on immoveable property a widow entitled to maintenance can be said to have a charge on the immoveable property within the meaning of Sec. 100 of the Transfer of Property Act. The position of the widow is that of a person who by virtue of the decree for the first time acquires a charge on specified immoveable properties and Order 34 Rule 14 has no application to her case.

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1. (1914) I. L. R. 42 C. 780.
2. (1900) I. L. R. 22 A. 326.
3. (1901) I. L. R. 24 A. 160.
4. (1896) I. L. R. 19 M. 271.
5. (1877) I. L. R. 2 B 494.
6. (1916) 2 Pat. L. J. 55.
7. (1906) 4 C. L. J. 476.

Sowbagia Ammal v. Manicka Mudaliar.

Unless the case can be brought within Order 34 Rule 14 there can be little doubt that a decree for future maintenance can be executed by proceeding in execution against the properties charged thereby with the payment of the amount decreed. *Ashutosh Bannerjee* v. *Lukhimoni Debya* [1], *Asad Ali Molla* v. *Haider Ali* [2], *Minakshi Achi* v. *Sadasiva Udayan* [3], *Subbanna Bhatta* v. *Subbanna* [4].

We are of opinion that the plaintiff is entitled to execute her decree by bringing to sale the properties charged with her maintenance. We reverse the order of the District Court and direct that the execution petition be restored to file and dealt with according to law. Respondents will pay appellant's costs in this and the lower court.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUBRAMANIA AIYAR AND MR. JUSTICE MOORE.

Kasaram Rangiah ... ... *Plaintiff.**

v.

Malla Chengama Naidu ... ... *Defendant.*

Kasaram Rangiah v. Malla Chengama Naidu.

Stamp Act, S. 35 (a)—*Document—Construction—Bond or Promissory note—Admissibility in evidence on payment of penalty and stamp duty.*

A document attested by two witnesses and stamped with an adhesive stamp of one anna, ran as follows :—

"Promissory note executed on 30-9-1903 to R. by M. C. I promise to pay you or your heirs, on demand, the sum of Rs. 40, the amount I borrowed from you this day, with interest at 1 per cent. per mensem on the said amount............ .... (Sd) M. C."

Held, that the document was a bond and not a promissory note, and that it could be admitted in evidence on payment of penalty and stamp duty under S. 35 (*a*) of the Stamp Act.

Case stated under Section 617, Act XIV of 1882 by the District Munsif of Tiruvallur in Small Cause Suit No. 1098 of 1905.

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* Ref. Case No. 20 of 1905. 15th February 1906.

1. (1891) I. L. R. 19 C 139.
2. (1910) I. L. R. 38 C. 13.
3. (1901) I. L. R. 24 M. 689.
4. (1907) I. L. R. 30 M. 324.

Kasaram Rangiah v. Malla Chengama Naidu.

Small Cause No. 1098 of 1905 referred to above is a suit upon an instrument, copy of which is herewith submitted with a true translation* thereof. The defendant is exparte. Two questions arise with reference to the instrument upon which the suit is based; first whether it is duly stamped within the meaning of the Stamp Act, and secondly whether it can be admitted in evidence on payment of penalty and stamp duty under S. 35, proviso (a) of the Stamp Act.

2. The answer to the first question is in my opinion, in the negative. The instrument in question not being payable to order or bearer and attested by witnesses, falls within S. 2, Clause 5 (b) of Act II of 1899. It also falls within the definition of a promissory note given in the Stamp Act, it being a promissory note as defined by the Negotiable Instrument Act, 1881 (vide S. 2 (22)). The instrument in question comes therefore within two descriptions of Schedule I of the Stamp Act, and as the duties therefor are different, should be charged with the highest of such duties under S. 6 of the Act. The instrument having been stamped with an one anna stamp, it is not sufficiently stamped and therefore not duly stamped.

3. My opinion as regards the 2nd question is that the instrument in question cannot be admitted in evidence under S. 35 proviso (a) of the Stamp Act. Such instruments were before the new Stamp Act treated as bonds and admitted in evidence on payment of penalty and stamp duty under S. 34 proviso (i) of the Stamp Act of 1879. The Madras High Court has in I. L. R. 8 M. 87 decided to that effect. But the Stamp Act of 1879 did not contain a definition of a Promissory note. It contained a definition of a bond identical with that of the same in the present Stamp Act, with the difference that "includes" has been substituted after "bond" for "means" in the old Act. Such instruments would not therefore come under any other class but "bonds", under the old Stamp Act. The new Stamp Act having introduced a definition of promissory note, which does not exclude, whether inadvertently or otherwise, instruments falling under S. 2 Clause 5 (b), the question requires reconsideration with reference to the altered state of the law.

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* Promissory note executed on the 30th day of September 1903 to Raghupathi Aiyar *alias* Chenchier, son of Modupallay Krishna Aiyar a resident of Kalahasti within the Sub-District of Kalahasti, in the District of North Arcot by Chengama Naidu, son of Malla Veerasami Naidu, a resident of Mopurpallai Village, Sathiavedu Division in the District of Chingleput. I promise to pay you or your heirs, on demand the sum of Rupees forty, the amount I borrowed from you this day in cash owing to emergency, with interest at 1 per cent per mensem on the said amount. Thus this promissory note was executed with my consent at Egumachira village.

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4. The only provision in the Stamp Act empowering Civil Courts to admit documents not duly stamped in evidence, is proviso (a) of S. 35 of the Stamp Act. That proviso runs as follows: "Any such instrument *not being*..*a promissory note*-shall...............................". To be admitted in evidence on payment of penalty and stamp duty or deficient stamp duty under the said proviso, the instrument *must not be* an instrument chargeable with a duty of one anna only or a bill of exchange or promissory note. It cannot be said that the instrument in question is not "*a promissory note*", it falling within the definition of a promissory note as defined in the Act though it may also be said to fall under another head. S. 6 does not lay down that an instrument coming under two or more descriptions mentioned in schedule (i) should be considered to fall within the description chargeable with the highest duty to the exclusion of other descriptions.

5. It may not always be the case that a bond is chargeable with a higher duty than a promissory note. Instruments not payable to order or bearer and attested by a witness and payable otherwise than on demand but not more than one year after date or sight fall under S. 2, Clause 5 (b) and under the definition of a promissory note. When the amount of such instrument does not exceed Rs. 10 the duty payable under either description is the same. Similarly instruments not payable to order or bearer and attested by a witness and payable at more than one year after date or sight, would be chargeable with the same duty under either description.

6. I am therefore of opinion that even though it is chargeable with the duty on a bond, it cannot be said that it is not a promissory note and that the document in question cannot be admitted in evidence and no penalty and stamp duty levied under S. 35 (a) by this court. The legislature might not have intended so, but courts are bound not to override the plain meaning of the words used by the legislature by introducing words which are not there, to carry out any supposed intention of the legislature. I think that, unless the words "not falling under any other definition" or words to that effect, are introduced after the words "a bill of exchange or promissory note" in the said proviso the document in question cannot be admitted in evidence.

7. The insertion of the word "only" after the words "with a duty of one anna" in the said proviso, and its omission after "or a bill of exchange or a promissory note" also supports the view I take. But it may be argued that fiscal enactments should be strictly construed in favour of the subject, that the insertion of the word "only" after "with a duty of one anna", was to make the meaning more clear, that no adverse inference should be drawn from the absence of that

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word after "bill of exchange or promissory note" and that notwithstanding the absence of that word after "bill of exchange or promissory note", promissory note should there be understood to mean an instrument falling under the definition and that alone, such a construction is possible, though it would be rather a very strained one.

8. In this connection I beg to invite the attention of Their Lordships to the recent case of *Attorney General* v. *Carlton Bank* [1], a summary of which is given in 9 Madras Law Journal at 379, 380 wherein it has been held that there is no rule that Revenue Acts should be construed liberally in favour of the subject and that, in all cases, the plain and the only rule of construction is to ascertain the intention of the Legislature and give effect to it, irrespective of the hardship or inconvenience that may arise from its application. The Editor of the Law Quarterly Review, though he takes exception to some words used by the Lord Chief Justice Russell in the above case remarks "When a tax was a real gift from the tax-payer to the King it was reasonable to construe narrowly the terms of the grant. Now the Taxing Act is a Law passed by a nation for the raising of money required for the national expenditure, there is no apparent reason why it should be construed differently from any other statute". The remarks of the Editor of the Law Quarterly Review are quoted at pages XCI and XCV of the introduction to Jagannada Aiyar's Stamp Manual.

9. The English Law on the subject might also be considered in this connection. The English Stamp Act, 1891 (54 and 55 Vic. Ch. 39) does not include such instruments as are under consideration, under any other class but promissory notes. That Act does not contain also any section corresponding to Section 6 of the Indian Stamp Act. Hence such instruments, if unstamped, cannot be admitted in evidence under the English Law under Sections 14 and 37 of the English Stamp Act. If there is any hardship, it is one common to both the Indian and English Laws. It is one common to bills of exchange and other promissory notes and instruments chargeable with a duty of one anna only. There is no apparent reason too why this class of promissory notes should be preferred to the others that are excluded.

10. One other point might also be taken into consideration in this connection. If unstamped instruments not payable to order or bearer cannot be admitted in evidence at all, if not attested by a witness, and should be admitted in evidence if attested on payment of penalty and stamp duty, what a wide door is opened for fraud and temptation to successfully forge and fabricate without much difficulty

1. L. R. (1899) 2 Q. B 158.

attestations to such instruments when occasion arises for using such in evidence.

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11. As several suits upon instruments of the kind in question are filed and as I feel reasonable doubt as to the admissibility of such documents in evidence and as the question is one of general importance to the litigant public, I have ventured to make this reference to the High Court upon the following question :

Whether an instrument which is not payable to order or bearer and is attested by witness and stamped with an adhesive stamp of one anna can be admitted in evidence on payment of penalty and stamp duty, under S. 35 (a) of the Stamp Act ?

12. The suit has been adjourned to 15th February pending the decision of the High Court on the reference.

13. As I do not feel doubt as to the amount of duty payable on the intrument, I have not chosen to make the reference under Section 60 of the Stamp Act.

14. Court Fees for service on Plaintiff and Defendant have been levied and submitted herewith.

The Court delivered the following

Judgment :—The document is a bond and not a promissory note. *Venku* v. *Sitaram* [1]. It consequently can be admitted in evidence on payment of penalty and stamp duty under Section 35 (a) of the Stamp Act.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING.

Natuthodi Kunhi Moidin ... *Petitioner** (*Accused*)

v.

P. R. Chamu Nair .... *Respondent* (*Complainant*).

Kunhi Moidin v. Chamu Nair.

Workmen's Breach of Contract Act (XIII of 1859)—'*Workman*', *meaning of* —*Scope of the Act.*

It is necessary that a person should be an artificer, workman or labourer before the provisions of the Workmen's Breach of Contract Act can be enforced against him.

Per Sadasiva Aiyar, J :—The term 'workman' in the Act is used in its popular sense and means "operative, man hired to do manual labour".

Per Ayling, J. :—The word 'workman' in the Act must be understood as connoting manual labour of some kind whether skilled or unskilled.

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* Crl. R. C. No. 332 of 1917. 12th October, 1917.

1. (1904) I. L. R. 29 B. 82.

Kunhi Moidin v. Chamu Nair.

Per Phillips, J :—The word "workman" has a very wide meaning denoting (1) a man who is employed in manual labour whether skilled or unskilled (2) one who works in any department of physical or mental labour.

Petition under S. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Second Class Magistrate of Ernad Taluq dated 8th January 1917 in Miscellaneous Case No. 193 of 1916.

The case came on for hearing in the first instance before Sadasiva Aiyar and Phillips, JJ., on the 7th September 1907.

B. Pocker for Petitioner.

D. Chamier instructed by King and Patridge for Respondents.

Public Prosecutor for the Crown.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments.—*Sadasiva Aiyar, J.* :—I am clear that the words "workman" and "labourer" in Act 13 of 1859 (which does not define these terms) are used in the ordinary popular sense. "Labourer" means "man doing for wages work that requires strength or patience rather than skill or training" and "workman" means "operative, man hired to do manual labour." (See the Concise Oxford Dictionary).

It seems to me that the petitioner who was entrustsd with such a large sum of money as Rs. 2,500 as advance and who was considered to possess the influence, tact and skill necessary to bring and keep on the estate 170 ordinary coolies and 80 coolies skilled in tapping for rubber cannot be presumed to be a workman or labourer. He was to be given 10 per cent commission on the wages of his Kol maistries and coolies and he was to be given a *further* Rs. 25 a month if he chose to reside on the estate. The promise to pay Rs. 25 a month to induce him to reside in the estate was (according to what I consider, the natural and reasonable construction of the agreement) evidently in order that the estate might have the benefit of his continual supervision of his coolies on the very spot and it does not show that he was himself a workman or labourer or that it was intended that he should employ himself as such during his residence on the estate.

The Sub-Magistrate has passed his order in a very summary manner, While the agreement states that the petitioner was to supply 170 ordinary coolies and 80 tapping coolies, the Magistrate refers only to the latter 80 coolies; the complaint and the sworn statement of complainant do not allege that the petitioner is a

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workman or labourer, the Magistrate does not state in his order that the petitioner is a workman or labourer (admittedly he is not an "artificer") and on the petitioner's bare admission that he had executed the contract, received the advance and failed to have the work completed, an order was made under S. 2 of Act XIII of 1859. There is nothing to show that the petitioner was asked to state his defence whether on the law or on the facts. I would therefore set aside the order as the complaint does not state that the petitioner is a workman or labourer, as the Magistrate has not found that the petitioner is a workman or labourer and as there is no legal evidence on the record to prove that he is one.

Phillips, J.

Phillips, J:—The Magistrate has dealt with this case as one falling under S. 2 of Act XIII of 1859, but petitioner now contends that he was wrong. His two chief grounds of contention are (1) that petitioner did not contract to do any work but only to supply coolies, (2) that petitioner is not a workman, labourer or artificer within the meaning of the Act. It has been held by this Court that when a workman contracts to get work done by coolies he comes within the provisions of the Act even though he does not actually work himself (1 Weir's Cr. R., pages 675, 676 and *Ramasami* v. *Kandasami* [1]). In the present case the contract was clearly one to get work performed and not merely one to supply labour, and therefore comes within the Act.

As regards the second point we have really no direct evidence of petitioner's status. No doubt to bring him within the Act petitioner must be a labourer, workman or artificer. The word 'workman' has a very wide meaning and is defined in the Century Dictionary as (1) a man who is employed in manual labour whether skilled or unskilled, (2) one who works in any department of physical or mental labour. Even under the Workman's Compensation Act the word has a very wide meaning (*vide* Stroud's Judicial Dictionary). In *Mamubeari, In re* [2] the question was considered and it was held that "conveying clay" would be work within the meaning of Act XIII of 1859 provided the personal labour of the person undertaking the conveyance is intended to be utilised. The case in *Gilby* v. *Subbu Pillai* [3] may be distinguished on the ground that in that case there was a distinct finding of fact that the contractor was not a workman. In the present case it is

1. (1885) I. L. R. 8 M. 379. 2. (1914) 27 M. L. J. 392.
3. (1883) I. L. R. 7 M. 100.

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Phillips, J.

clear from the contract that petitioner was to do some kind of work, for he is to be paid Rs. 25 per mensem as remuneration and an additional commission provided he "works" satisfactorily. His work might merely consist in supervision but in any case he had some work to do. The provision in the contract that he was to live on the estate shows he was expected to do some work in connection with the contract which was a contract for the performance of manual labour. This being so it would appear that he was a workman within the meaning of the Act, and as he did not raise this point in the lower Court I do not think he can now be allowed an opportunity of showing that he was not to do any work under the contract and was not a workman. I would therefore dismiss this petition.

(The Petition came on again for hearing under S. 429, Criminal Procedure Code on 2nd October 1917 before Ayling, J.)

B. Pocker for Petitioner.

Public Prosecutor for the Crown.

K. Pandalai instructed by King and Patridge for complainant.

Ayling, J.

Order:—*Ayling, J.*—I agree with Phillips, J., that the contract was one, not merely to supply labour, but to get work performed by workmen or labourers, and, to that extent comes within the scope of Act 13 of 1859. But it is further necessary, *vide* Section (1) that any person against whom the Act is sought to be enforced should be himself "an artificer, workman or labourer": and this is a point, on which not only is there no finding by the Magistrate but which has apparently escaped his attention altogether.

This status of the accused person is an integral part of the case which the complainant has to establish; and if there is no evidence, the Magistrate's order cannot stand, no matter whether the accused did, or did not raise the point before him.

With all respect, I cannot agree with my learned brother Phillips, J., in holding (as I think he does) that the evidence on record is sufficient to establish that the present petitioner (accused) is a workman within the meaning of the Act. The secondary definition of "workman" quoted by him from the Century Dictionary "one who works in any department of physical or mental labour" cannot in my opinion be applied here. It is broad enough to include any one but an absolute idler, and would cover many classes who have been specifically held not to come under the Act: *e. g.*, horsekeepers, cooks, temple servants and cartmen (*vide* Criminal

Revision Cases Nos. 159 of 1883, 2 of 1890, 412 of 1902 and 1427 of 1877 all reported in I. Weir, Crl. R., pages 688—690). In a recent case Miller, J. held that a musician in a band was not a workman. (*Vide Re Rosario Quadros* [1]). Of course all these are very different from plantation coolies: but the cases are good authority for holding that the word "workman" cannot be understood in this sense. The position of the word "workman" sandwiched in between "artificer" and "labourer" is most significant: and I am inclined to agree with petitioner's vakil that the words were purposely used in the order in which they appear, in order to indicate a descending scale from skilled to unskilled labour. A perusal of the preamble of the Act, which was passed primarily in the interests of manufacturers, tradesmen and others in the Presidency Towns goes to strengthen this impression. I think the word "workman" must be understood as connoting manual labour of some kind, whether skilled or unskilled.

Then it is argued that as the coolies and tapping coolies by whom petitioner contracted to get work done were undoubtedly workmen, he also must be regarded as a workman, on the ground that he was employed to supervise them. It is not suggested that he had any other work to do beyond supervision of the most general description. There is a separate provision for "Kol maistries"—one for every 16, or 25 coolies according to the nature of the work. Even this general supervision by petitioner is no essential part of the contract. There is no provision requiring that he should live on the estate: it is simply provided that *if he does*, he is to get Rs. 25 a month. His work even as a general supervisor is purely optional; and there is nothing to show that he did any or cared to avail himself of the clause in question. Even apart from this and assuming that his working as a supervisor over the coolies supplied by him was a part of his undertaking, I should find the greatest difficulty in the way of holding that a supervisor over 250 coolies, regarding whose labour he has contracted, is a "workman" within the meaning of the Act. A man, who does work of an intellectual nature in connection with a contract involving manual labour cannot, I think, simply for that reason, be viewed as a manual labourer: and the word workman must be understood in the same sense wherever it occurs in the Act. That personal (in the sense of manual) labour by the

1. (1913) I. L. R. 38 Mad. 551.

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Ayling, J.

defendant—contractor is essential to the enforcement of the Act seems to me to be recognised in *Gilby* v. *Subbu Pillai* [1], and *Caluram* v. *Chengappa* [2], as well as in a recent case to which I was a party (*Mamubeari in re* [3]), while in another reported case *Ramasami* v. *Kandasami* [4], it is made clear that the defaulting contractor was a person of the cooly class who bound himself to render personal labour, if the advance was not worked out by the coolies whom he contracted to supply.

I find two early cases, 3 Mad. H. C. App. XXV and *Rowson* v. *Hanama Maistri* [5], in which the enforcement of the Act was certainly allowed without, so far as appears any consideration of this point—merely on the ground that the contract was one to get work performed. But it seems to me more likely that the point was one to which the attention of the learned Judges was not directed, rather than one which they considered immaterial. There is nothing in these judgments to suggest that they adopted the reasoning referred to above. All the later cases tend in the contrary direction: and they seem to be in accord with the wording of the Act.

After careful consideration I can only concur in the conclusion of Sadasiva Aiyar, J. and direct that the order be set aside.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS.

L. A. L. Alagappa Chettiar ... *Petitioner in both* *

v.

Naganatha Mudaliar and others ... *Respondents.*

Alagappa Chettiar v. Naganatha Mudaliar.

Provincial Insolvency Act, Sec. 22—" Person aggrieved by any act or decision of the receiver " , meaning of—Application by a third person that property ordered to be sold belongs to him and not the insolvent—Application rejected—Whether such person is a person aggrieved.

A person is " aggrieved by an act or decision of the receiver " within the meaning of S. 22 of the Provincial Insolvency Act if a decision has been pronounced which has wrongfully refused him something which he has a right to demand.

A person who applies to the official receiver claiming that a certain property put up for sale as the property of the insolvent is not the property of the insolvent but

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* C. R. P. Nos. 797 and 798 of 1916. 21st July 1917.

1. (1883) I. L. R. 7 M. 10.
2. (1883) I. L. R 13 M. 315.
3. (1914) 27 M. L. J. 392.
4. (1885) I. L. R. 8 M. 379.
5. (1877) I. L. R. 1 M. 280.

of the applicant and as such ought not to be sold as the property of the insolvent, is a person aggrieved by the order if notwithstanding the application the property is ordered to be sold.

Petition under S. 46, Cl. 1 of Act II of 1907 praying the High Court to revise the order of the District Court of Tanjore in C. M. A. Nos. 89 and 90 of 1915 preferred against the decree of the court of the Principal District Munsif of Kumbakonum in O. P. Nos. 545 and 613 of 1915 in I. P. No. 18 of 1914.

T. Narasimha Aiyangar for Petitioner.

K. Bhashyam and *N. Kunjithapatham Iyer* for Respondents.

The Court delivered the following

Judgment:—Petitioner is a creditor of 3rd respondent, an insolvent. First respondent in C. R. P. No. 798 of 1916 is a son of the insolvent and claims the properties in dispute under a will of his grandfather, between whom and the insolvent there was a partition in 1908. First respondent in C. R. P. No. 797 of 1916 (called hereafter 1st respondent) is an alienee from the minor. The properties left by will to the minor were sought to be sold by the creditors and at the request of the petitioner, the Official Receiver on 10th April 1915 ordered the sale of half the properties. First respondent in C. R. P. No. 797 of 1916 then put in a petition asking that the properties should not be sold as they did not belong to the insolvent. On 21st April 1915 the Official Receiver passed the following order :—

"I have no jurisdiction to decide whether the insolvent has a saleable interest. That is a matter which should be decided by a Court having jurisdiction in a regular suit between the future purchaser and the applicant. Of course this claim will be notified at the time of sale and the purchaser will purchase with knowledge of the claim. I have no reason to stop the sale. Petition rejected". On 23rd April 1915 the 1st respondent put in a petition under S. 22 of the Provincial Insolvency Act. The District Munsif held that the petition did not lie under S. 22, but held that the court had inherent power to review the conduct of its servant, the Official Receiver, and allowed the petition. The District Judge did not go into the question of jurisdiction but dismissed the appeal on the merits. It is now contended on behalf of petitioner (1) that the petition did not lie under S. 22, (2) that if it did lie, it was out of time, (3) that the court has no inherent power to deal with such a petition.

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The second point can briefly be disposed of, for the order of the Official Receiver complained of was passed on 21st April 1915 and the petition was filed 2 days later, and was well within the time allowed.

As regards the 1st point the question for decision is whether the petitioner in O. P. No. 545 of 1915 was aggrieved by the decision of the Receiver within the meaning of S. 22 of the Provincial Insolvency Act. In *ex parte Sidebotham*: *In re Sidebotham* [1]. James, L. J., held that "a 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something."

This definition was considered in *ex parte Official Receiver*: *In re Reed Bowen & Co.* [2], and Lord Esher, M. R. interpreted it at pp. 177 and 178 as including "a man against whom a decision has been pronounced which has wrongfully refused him something which he had a right to demand"; while Lopes, L. J., remarked at page 181 "I am not at all prepared to say that a man who has asked something which he is authorised and entitled to ask under the Act has not when his application is refused 'suffered a legal grievance'." This case was referred to and approved in *In re Lamb* : *Ex parte the Board of Trade* [3], where Kay, L. J., remarked "when two persons are in the position of litigants before the High Court and the decision of the court goes against one of them how can it be said that he is not a person aggrieved by the decision." In *Sivaramiah* v. *Bhujanga Row*, [4], a Bench of this Court held that the decision must be such as to affect the right claimed and not merely to impede the person concerned in his assertion of it and that is the view taken in *Huneswar* v. *Rakkal Das* [5]; but in neither of these cases was any reference made to *Ex parte Official Receiver, In re Reed Bowen & Co.*, [2] or to *In re Lamb*: *Ex-parte The Board of Trade* [3]; whereas in *Thiruvenkatachariar* v. *Thangayi Ammal* [6] these two cases were followed and a creditor was held to be aggrieved by the failure to publish an order which was likely to depreciate the value of the insolvent's property which was to be sold under that order. This Act did not actually deprive

1. (1880) 14 Ch. D. 458 at 465.
2. (1887) 19 Q. B. D 174.
3. (1894) 2 Q. B. D. 805.
4. (1917) M. W. N. 75.
5. (1913) 18 C. L J. 369.
6. (1915) I. L. R. 39 M 479.

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the creditor of anything to which he was legally entitled, but it tended to render the task of recovering his dues more difficult, and as such he was held to be aggrieved. In the present case the order of the Receiver had no effect whatever on the legal rights of the 1st respondent, but it was likely to involve him in difficulties in asserting his title to the property, which, as has now been found, was really his. "Aggrieved" is a somewhat wider term than injured and if we adopt Lord Esher's definition that a person is aggrieved if a decision has been pronounced which has wrongfully refused him something—which he had a right to demand —the 1st respondent is clearly aggrieved by the decision of the Receiver, for he had a right to demand that his own property should not be sold by an officer of the court belonging to some one else.

In this view it is unnecessary to decide whether a court has inherent power to review all acts of an Official Receiver, for the petitions come within Sec. 22 of the Provincial Insolvency Act. The petitions are accordingly dismissed with costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BAKEWELL AND MR. JUSTICE PHILLIPS.

Ariyaputhra Goundan ... *Appellant* * *(1st Plaintiff)*

v.

Ettiya Goundan and others ... *Respondents' Defendants 1 to 55.*

Ariyaputhra Goundan v. Ettiya Goundan.

Indian Registration Act, Sec. 17, 2 (vi)—Compromise of suit—Decree passed in accordance with compromise—Decree passed on considering the beneficial nature of the whole compromise—Portions of the razinama not relating to the suit property whether requires registration.

Where a court by its decree accepted the whole of a razinama as beneficial to the minor and in consequence of such acceptance, passed a decree in accordance therewith so far as the suit property is concerned, the other portions of the razinama do not require registration.

Where a decree is passed after a consideration of the whole razinama, the agreement becomes part and parcel of the decree; for it cannot be presumed that the decree would have been passed if the portion of the razinama relating only to the suit property had been considered; and as such no portion of the razinama requires registration.

Natesa Chetti v. Vengu Nachiar [1] followed.

Second appeal against the decree of District Court of South Arcot in A. S. No. 37 of 1915, preferred against the decree of the

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*S. A. No. 5 of 1916 7th August 1917.

1. (1910) I. L. R. 33 M. 102 at 108.

Ariyaputhra Goundan v. Ettiya Goundan.

Court of the District Munsif of Tindivanam, in O. S. No. 913 of 1913.

T. V. Muthukrishna Aiyar for Appellant.

C. Narasimha Chariar for Respondents.

The Court delivered the following

Phillips, J.

Judgments:—*Phillips, J*:—The question for determination is whether a razinama filed in O. S. No. 8 of 1912 in the District Munsif's court, Tindivanam required registration in respect of the portions in the razinama which were not given effect to in the decree in that suit. It must be noted here that one of the parties to O. S. No. 8 of 1912 was a minor and consequently the court had to consider the whole razinama and come to a decision as to whether it was beneficial to the minor, and it did so consider it as is recited in the decree. In this view the case appears to be governed by the principles enunciated by the Privy Council in *Pranal Anni v. Lakshmi Anni* [1] where their Lordships say:—"The razinama in so far as it was submitted to and was acted upon judicially by the learned Judge was in itself a step of judicial procedure not requiring registration." The razinama before us was submitted to and acted judicially upon by the District Munsif, and these remarks would appear to apply. The court by its decree accepted the whole razinama as being beneficial to the minor, and in consequence of such acceptance passed a decree in accordance therewith so far as the suit property was concerned. The whole razinama was thus embodied in the decree of the Court and consequently requires no registration.

This was the view taken by this court in *Natesa Chetti* v. *Vengu Nachiar* [2] but was dissented from by another Bench in *Chellamanna* v. *Rama Row*[3] (following *Birbhadra Nath* v. *Kalpataru Panda* [4], *Kali Charan Ghosal* v. *Ram Chundra Mandal* [5] and *Gurdeo Singh* v. *Chandrika Singh* and *Chandrika Singh* v. *Rash Behary Singh* [6] in which the remarks of the Privy Council in *Pranal Anni* v. *Lakshmi Anni* [1] were explained, as meaning merely that the entry of an agreement in a decree or order of court would be relevant to prove the agreement. This proposition is provided for by section 35 of the Evidence Act and therefore if those remarks are restricted to such a meaning they would appear to be redundant. If the court

1. (1899) I. L. R. 22 M. 508.
2. (1910) I. L. R. 33 M 102 at p. 108.
3. (1911) I. L. R 36 M 46.
4. (1905) I C. L. J. 388.
5. (1908) I. L. R. 30 C 783
6. (1907) I. L. R. 36 C. 193.

has newly considered the razinama in so far as it affects the property then in suit, the whole razinama cannot be said to have been submitted to and acted judicially upon by a court and this was the view taken in *Muthayya* v. *Venkataratnam* [1] and *Patha Muthammal* v. *Esup Rowther* [2] where it was held that the razinama in respect of property not comprised in the decree would not be exempt from the provisions of section 17 of the Registration Act. Where as in this case, the decree was passed after Judicial consideration of the whole razinama, the agreement becomes part and parcel of the decree, for it cannot be presumed that the decree would have been passed if the portion of the razinama relating only to the suit property had been considered. The reasons for passing the decree were (1) that the parties agreed to it, (2) that the razinama as a whole was beneficial to the minor and therefore in the words of their Lordships of the Privy Council in *Pranal Anni* v *Lakshmi Anni* [3] the order was pronounced in terms of the razinama and gave immediate effect to it so far as was possible in the decree itself.

Ariyaputhra Goundan v. Ettiya Goundan.

Phillips, J.

I would therefore hold that the razinama does not require registration and is admissible in evidence. The appeal is accordingly allowed with costs here and in the Lower Appellate Court.

Bakewell, J.

Bakewell, J.—I agree. The decree constitutes an estoppel by matter of record between the parties, and this appears to be the principle upon which decrees and orders of court are excepted from the operation of S. 17 of the Registration Act, and to be implied in the expressions "step of judicial procedure" and "judicial evidence" used by their Lordships of the Privy Council in the case cited by my learned brother. If therefore the terms of the compromise are recognised by the decree as binding upon the parties, the latter are bound by virtue of the decree and it is immaterial that the decree itself does not profess to carry out all those terms, except for purposes of execution.

C. A. S.

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1. (1902) I. L. R. 25 M. 558
2. (1906) I. L. R. 29 M. 365
3. (1899) I. L. R. 22 M. 508

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE BAKEWELL AND MR. JUSTICE KUMARASWAMI SASTRI.

Vema Rangiah Chetty ... *Appellant** *(Defendant)*

v.

V. M. Vajravelu Mudaliar ... *Respondent (Plaintiff).*

Vema Rangiah Chetty v. Vajravelu Mudaliar.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 7—Landlord and tenant—Demise of two properties—Lessor's right to one of the villages lost by decree—Suit for rent for the remaining property at a rateable amount—No allegation of apportionment—Whether a suit for apportionment of rent apportionment of rent—Purchaser of the lessor's interest in one of the properties in execution—Transfer of Property Act, S. 36, principle of—Applicability.

Where two properties were demised by the plaintiff to the defendant for a lump sum and subsequently the plaintiff lost his title to one of the properties by a decree and the plaintiff sues for rent claiming a rateable amount of the properties still owned by him without any allegation of the rent having been apportioned the suit is one for an apportionment of rent within the meaning of Art. 7, Sch. II of the Provincial Small Cause Courts Act as the suit involves an apportionment of rent and cannot be decided without apportioning the same.

The provision in S. 36 of the Transfer of Property Act as to apportionment of rent is a rule of justice, equity and good conscience and it therefore applies to sales in execution.

Kunhi Sow v. *Mulloli Chathu* [1], foll. *Mathewson* v. *Shyama Sundar Simha* [2], dist.

Rent can be apportioned between the original lessor and the purchaser of his interest in execution at court sale on the principle of S. 36 of the Transfer of Property Act.

Appeal under clause 15 of the Letters Patent against the Judgment of the Honourable Mr. Justice Sadasiva Aiyar in S. A. No. 1431 of 1915 preferred against the decree of the court of the Subordinate Judge of North Arcot in A. S. No. 142 of 1914 preferred against the decree of the court of the District Munsif of Sholinghur in O. S. No. 140 of 1913.

The case came on for hearing in the first instance, before Sadasiva Aiyar, and Spencer, JJ. who delivered the following

Judgments :—*Spencer, J.*—This suit was brought to recover the lease amount for fruit trees in certain forests. A preliminary objection has been raised that no second appeal lies, as the suit is of a Small Cause nature. The appellant's vakil answers this objection by a reference to Art. 7 of the Second Schedule of the Provincial Small Cause Courts Act which exempts suits for the assessment, enhancement, abatement, or apportionment of the rent of immoveable property. From the definition of "rent" in S. 105 of the Transfer of Property

* L. P. A. No 57 of 1917. 12th September 1917.

1. (1912) I. L. R. 38 M. 86=23 M. L. J. 695. 2. (1906) I. L. R. 33 C 786.

Vema Rangiah Chetty v. Vajravelu Mudaliar.

Spencer, J.

Act and from the definition of "immoveable property" in the General Clauses Act and from the use of the word "apportionment" in S. 36 of the former act, I have little hesitation in thinking that the article in question covers a suit of this nature. Where, as here, there has been a transfer of a part of the lessor's interest through a decree of Court, the application of S. 36 is excluded by S. 2 (d) of the same Act, vide *Mathewson* v. *Shyam Sunder Sinha* [1]. But in order to determine what legal significance should be given to the word "apportionment", we may look to the section and see in what sense the word is used where it occurs in other enactments.

Where a definite extent of land is leased for a certain term upon a rent for a fixed sum and the lessor brings a suit upon his contract, I do not think that the jurisdiction of the Small Case Court would be taken away by Article 7 merely because the liabilities of more parties than one would have to be adjusted by an arithmetical calculation before the court could arrive at a decision in the suit. But from the whole tenor of Article 7, I think it was intended to take it out of the power of a Small Cause Court to adjudicate upon a question of what is a fair and equitable rent to be paid by a tenant to his landlord, having regard to the yield, fertility and extent of a holding and similar considerations, as that is rather within the province of a revenue court for Estates or a Court of Original Jurisdiction in other cases. Vide *Goopee Nath Ghose* v. *Kedar Nath Chuckerbutty* [2]. Now in the present case the original lease covered the forest produce of two villages, Maharajapuram and Nissangadurgam.

By a decree in another suit the plaintiff lost his title to Nissangadurgam, and, therefore, in this suit the District Munsif had to decide under the first issue what would be a fair and proper proportion out of the whole rent to be allotted for the produce of the Maharajapuram forests, when the relative value of the produce of the trees in each village had not been ascertained. He decided that the plaintiff's demand for 1/3 of the whole rent was not excessive under the circumstances.

In doing so he went further than a Small Cause Court having pecuniary jurisdiction over the suit could have gone. I would, therefore, disallow the appellant's objection.

I proceed then to the merits of this appeal.

On the admissions and findings of fact it appears that the lease was for ten years from 1901, that the year began on February 27th and ran till February 26th of the next Calendar year; that rent was payable in three instalments each year, *viz.*, on May 15th, November 15th and February 15th and that the plaintiff's title to the village of

1. (1906) I L. R. 33 C. 786. 2. (1875) 23 W. R. 426.

Vema Rangiah Chetty v. Vajravalu Mudaliar.

Spencer, J.

Maharajapuram was determined by the confirmation in December 1907 of the sale in Court auction in execution of a decree.

I consider that the Subordinate Judge was right in his view that all rents are upon the transfer of the interest of the lessor, to be deemed to accrue due from day to day,—Vide *Lakshmi Naranappa* v. *Melothraman Nair* [1] and *Kunhi Sow* v. *Mulloli Chathu* [2].

No doubt in a suit between the lessor and the assignee of his interest, the lessor, would be entitled to have the rent apportioned between them according to the duration of their respective titles, irrespective of the dates when the rent became payable by the tenant. But the lessee was under his contract not liable to pay the instalments before the dates appointed for the payment thereof. Therefore the plaintiff was by his contract entitled to collect the instalments which fell due on May 15th and November 15th 1907. But as his ownership ceased in December, there was no privity of estate between him and the lessee thereafter. Accordingly he was not entitled to recover from the lessee the amount which fell due on February 15th 1908, and the lessee who produced a receipt (Exhibit I) for the rent of Fasli 1317, paid to the purchaser at the court sale could claim that he had a good discharge for the third instalment of the year 1907-1908.

I need not discuss the other contentions of the appellant as they must fail on the finding of fact of the Lower Courts.

In the result I hold, that instead of the plaintiff getting a decree for 10/12 of the rent for 1907-1908 which amounts to 10/12ths of Rs. 116-10-6 or Rs. 97-3-0 and interest thereon he should for that year be given a decree for the 1st two instalments, that is, twice Rs. 38-14-2 or Rs. 77-12-4 and interest at the rate allowed in the Lower Court.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J. :— I regret that on the question of the nature of the suit as one of a Small Cause nature, I find myself unable to agree with the judgment just now pronounced by my learned brother.

I shall quote portions of the plaint to establish what I consider to be the nature of the suit. "5. It was decided in O. S. No. 131 of 1901 on the file of the District Munsif's Court of Sholinghur that the plaintiff has no right to Nisangadurgam village and forest included in the aforesaid properties. By virtue of the said decision the plaintiff claims only a rateable amount, *viz.*, 113 of the lease amount *i. e.*, Rs. 116-10-8 for Damodara Maharajapuram village enjoyed by the defendant's fatther."

"7. Ramasami Chetti, the defendant's father, settled the lease amounts up to 1904" (at the above rate of Rs. 116-10-8 per year) "in respect of Damodara Maharajapuram village enjoyed by him."

1. (1903) I. L. R. 26 M. 510 2. (1912) I. L. R. 38 M. 86=23 M. L. J. 695

Vema Rangiah Chetty v. Vajravelu Mudaliar.

Sadasiva Aiyar, J.

"Therefore the plaintiff prays that the court may be pleased to pass a decree for the amount of Rs. 319-4-3" made up of the instalments of rent due in 1907-1907-1908 with interest.

Now it seems to me clear from the plaint that the plaintiff's contention was that the proper apportionment of rent of the Damodara Maharajapuram village was Rs. 116-10-8 per year that the defendant's father accepted that as the proper apportionment and that he paid rent for Damodara Maharajapuram village and forest at the rate of Rs. 116-10-8 from 1901 (the date of the rent deed Ex. A) till 1904. I am therefore unable to hold that this is a suit for apportionment coming under clause 7 of second Schedule of the Provincial Small Cause Courts Act. It is really a suit for arrears of rent due after the apportionment had been made either by simultaneous agreement between both parties or by one party with the consent of the other. Even if it was an apportionment which was made only by the plaintiff but which the plaintiff alleges to be an equitable apportionment binding on the defendant, still the suit is only a suit for recovery of the arrears of such apportioned rent and not for apportionment. Apportionment may be (a) as regards rents of different periods of time or (b) as regards rents due by portions or fractions of the demised premises.

But whatever be the share of the original rent which would be due by the defendant on an equitable apportionment, a suit which prays for the relief of the recovery of a definite sum as the share of arrears of such rent due to the plaintiff cannot be called a suit for an apportionment of the rent. In *Vira Pillai* v. *Rangasami Pillai* [1], a suit for the recovery of rent at an enhanced rate from a tenant holding over (the enhanced rate having been fixed by the plaintiff himself as damages for use and occupation) was held not to be a suit for assessment or enhancement of rent falling under clause 7. The nature of the plaintiff's suit had to be found from the relief prayed for in the present suit is the recovery of a sum of money claimed to be due as rent to the plaintiff. Even if the court has to give findings as to the proper apportionment of rent to be paid for the plaint land, still it is a suit for the recovery of such a rent. As pointed out in *Chilukuri Sitaramayya* v. *Venkata Rangayya Appa Rao* [2], a suit for enhancement of rent seem to mean, a suit for a "declaration by the court as to what the proper rent is, payable by the tenant in all years to come." In that case, it was held that a suit for enhanced Kattubadi was not a suit for enhanced rent under clause 7 of the 2nd Schedule of the Provincial Small Cause Courts Act and that hence no second appeal lay when the claim was below Rs. 500. I think the above decision is a direct authority on the present question. The court's duty to pronounce incidental findings on questions *which* a Small

1. (1898) I. L. R. 22 M. 149.
2. (1915) 31 I. C. 871.

Vema Rangiah Chetty v. Vajravelu Mudaliar.

Sadasiva Aiyar, J.

Cause Court cannot finally determine has never been held to change the character of the suit if the substantial relief prayed for makes the suit one of a small cause nature. In the result, I would hold that no second appeal lay and I would accordingly dismiss the second appeal. Even if we allow the second appeal to be amended as a revision petition under section 115 of the Civil Procedure Code, such revision petition would also have to be dismissed with costs, no question of jurisdiction or acting illegally or with material irregularity being involved. I shall not express any final opinion on the difficult question whether the plaintiff is legally entitled to 10/12ths or only 2/3 share of the rent claimed.

The Court:—Under S. 98 of the Civil Procedure Code the Second appeal is dismissed with costs.

T. V. Muthukrishna for Appellants.

K. P. Lakshmana Rao for Respondents.

The Court delivered the following

Judgment:—The learned Judges have differed on the question whether a second appeal lies to this court and that depends upon the question whether the present suit is one of a small cause nature, and if it be a suit for the apportionment of rent it is not of a small cause nature (see Article 7 of 2nd Schedule of the Provincial Small Cause Courts Act). The plaint in this case recites that the lessee failed to get possession of a portion of the demised premises by reason of a decree against the lessor. The plaintiff who sues for rent claims only a rateable amount namely one-third of the stipulated rent or Rs. 116-10-8 a year. He does not allege that the rent had been apportioned at this figure by consent of the parties but only that the defendant had settled the claim for rent up to 1904 on what terms he does not say. The finding is that there was no agreement about it, and therefore it is quite clear that the suit did involve an apportionment of rent and could not have been decided without it, that, therefore it was not a suit of a small cause nature and that a second appeal lies. The Letters Patent appeal must be allowed with costs and we must proceed to dispose of the second appeal.

The only ground taken is that the Lower Courts were wrong in apportioning the rent between the original lessor and purchaser of his interest in execution at court sale. S. 36 of the Transfer of Property Act provides for such apportionment, and although it is no doubt true under S. 2 (d) of the Act it does not apply to sales in execution yet the section embodies a rule of justice, equity and good conscience which we think should be

Vema Rangiah Chetty v. Vajravelu Mudaliar.

applied. That appears to be the view taken by this court in *Kunhi Sow* v. *Mulloli Chathu* [1] following *Lakshminarayanappa* v. *Melathraman Nair* [2]. The case reported in *Satyendra Nath Thakur* v. *Nilakantha Singa* [3] was a case of a transfer of the lessee's interest and it is unnecessary for us to consider it. With great respect we are unable to follow the decision in *Mathewson* v. *Shyama Sundar Sinha* [4]. In this case the question may depend upon the terms of the contract of sale and neither the sale proclamation nor the sale certificate have been produced and in the absence of any evidence we must presume that what was sold was simply the land. The Second Appeal therefore fails and is dismissed with costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT :—SIR JOHN WALLIS, *Chief Justice*, MR. JUSTICE AYLING, AND MR. JUSTICE KUMARASAWMI SASTRI.

F. B.

Marturu Subbamma v. Gadde. Narayya

Marturu Subbamma ... *Appellant.** (*Defendant*).

v.

Gadde Narayya ... *Respondent*, (*Plaintiff.*)

Transfer of Property Act, S. 58 (d)—Usufructuary mortgagee—Meaning—Usufructuary mortgage—Failure of mortgagor to give possession of mortgaged property—Mortgagee's right to sue for sale of mortgaged property.

A usufructuary mortgagee is entitled to sue for the sale of the property mortgaged to him when the mortgagor fails to deliver possession of the said property to him and he has consequently to sue for the mortgage money.

Per The Chief Justice : A mortgagee to whom possession has not been given is not a usufructuary mortgagee within the meaning of S. 58 (d) of the Transfer of Property Act.

Samayya v. *Nagalingam* [5], *Arunachalan Chetty* v. *Ayyavayyan* [6] over ruled.

Ram Narain Singh v. *Adhindra Nath Mukherjee* [7] (P. C.) rel. upon.

Second Appeal against the decree of the District Court of Guntur in Appeal Suit No. 339 of 1913, preferred against the decree of the Court of the District Munsiff of Tenali in Original Suit No. 45 of 1913.

This case came on for hearing for the first time before (Seshagiri Aiyar and Kumaraswami Sastri, JJ.) who, made the following

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* S. A. No. 1672 of 1915. 17th October, 1917.

1. (1912) I. L. R. 38 M. 86.
2. (1903) I. L. R. 26 M. 540.
3. (1893) I. L. R. 21 C. 383.
4. (1906) I. L. R. 33 C. 786.
5. (1891) I L. R. 15 M. 174.
6. (1898) I. L. R. 21 M. 476.
7. (1916) I. L. R. 44 C. 388=32 M. L. J. 39.

F. B.

Marturu Subbamma v. Gadde Narayya.

ORDER OF REFERENCE TO A FULL BENCH:—

As regards the contention that there is a covenant to pay in respect of the mortgage of Item No. 1, we must overrule it, having regard to *Maharaja Ramanarayan Singh* v. *Adindra Nath Mukhurji* [1] and *Hakeem Patte Muhammad* v. *Shaik Davood*, [2]. Consequently S. 68, clause (*a*) of the Transfer of Property Act is not applicable. The further question is whether in the events which have happened, the mortgagee is not entitled to bring Item No. 1 to sale. The mortgagor covenanted to put the mortgagee in possession, and the finding is that he has broken the covenant. Therefore S. 68, clause *(c)* of the Transfer of Property Act applies.

Mr. Ramadas argued that the failure to give possession, although it may give a right to the mortgage money, would not enable the mortgagee to sue for the sale of the property. He is supported in his contention by *Arunachalam Chetti* v. *Ayyavayyan* [3] and by the cases following that decision. On the other hand the recent decision of the Judicial Committee in *Ram Narayan Singh* v. *Adhindra Nath Mukherji* [4] seems to suggest that the failure to fulfil the conditions mentioned in clauses (*b*) and (*c*) of S. 68 would ensure the same legal consequences as may be enforced under clause *(a)*.

The right to sue for sale under a covenant to pay the mortgage money is provided for by S.67 of the Transfer of Property Act. As at present advised, we fail to see why that section should not be appealed to where there is a default under clauses (*b*) and (*c*) of S. 68. *Arunachalam Chetti* v. *Ayyavayyan*[3] seems to proceed on the footing that the ordinary right of a usufructuary mortgagee to realise the monies due to him is to claim possession. In other words, notwithstanding the fact that the mortgagor refuses to perform his part of the contract, the mortgagee is only entitled to specific performance of the contract and is precluded from claiming any other relief. We think this position requires reconsideration. The Judicial Committee by saying that accounts might have to be taken in the case already referred to impliedly recognize the mortgagee's right to sue for the sale of the property and we think

1. (1916) 31 M. L. J. 251. 2. (1916) I. L. R. 39 M. 1010.
3. (1898) I. L. R. 21 M. 476 (F. B.)=8 M. L. J. 154.
4. (1916) 32 M. L. J. 39.

F. B.
Martur Subbamma v. Gadde Narayya.

that the restriction on the mortgagee's right enunciated in *Arunachalam Chetty* v. *Ayyavayyan* [1], is not justifiable.

Under these circumstances, we must refer the following question for the decision of the Full Bench.

"Whether a usufructuary mortgagee is not entitled to sue for the sale of the property mortgaged to him when the mortgagor fails to deliver possession of the said property to him and has consequently to sue for the money."

V. Ramadas, for the Appellant.

K. V. L. Narasimham, for the Respondent.

The Court expressed the following

Chief Justice.

Opinion:—*The Chief Justice*:—I agree with the referring Judges and answer the question in the affirmative. A mortgagee does not become a usufructuary mortgagee within the meaning of S. 58 (d) until the mortgagor has given him possession of the mortgaged property and so put him in a position to realize his security out of the accruing rents and profits. It is because the intention is that the security shall be realised in this manner that by S. 67 proviso (a) a usufructuary mortgagee as such is debarred from suing for foreclosure or sale under the section. A mortgagee to whom possession has not been given is not a usufructuary mortgagee. Consequently he does not come within the proviso and is entitled to sue for foreclosure or sale under the section in the absence of a contract to the contrary—"at any time after the mortgage money has become payable to him." S. 68 entitles the mortgagee to sue the mortgagor for the mortgage money "where the mortgagee, being entitled to possession of the property the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person." The first of these events having happened the mortgagee has become entitled to sue for the mortgage-money, or in other words, the mortgage money has become payable to him, and he is entitled under S. 67 to sue for foreclosure or sale, in the absence of a contract to the contrary which cannot be implied. On the contrary the fact that the mortgagor was unable to put the mortgagee in a position to

1. (1898) I. L. R. 21 M. 476.

F. B.

Marturu Subbamma v. Gadde Narayya.

Chief Justice.

realize his security out of the rents and profits makes it only reasonable that he should be remitted to the ordinary remedies of a mortgagee by foreclosure or sale, and the legislature has recognized this by making the mortgage money payable in this event. He has advanced his money on the security of the mortgagor's interest in the property, and mortgagor has failed to perform his part of the contract by putting him in possession and enabling him to realize his security in that manner, and there is no reason why he should not be allowed to realize it by bringing the mortgagor's interest to sale if he so desires or for requiring him to undergo the expense and trouble of litigation with third parties unless he is content to lose his security. These aspects of the question appear to have been overlooked in *Samayya* v. *Nagalingam* [1], *Arunachalam Chetti* v. *Ayyavayyan* [2]. In *Ram Narayan Singh* v. *Adhindra Nath Mukherji* [3] the Judicial Committee observed, "It must also be borne in mind that if the mortgagor be in the first instance under no personal liability, such liability may arise under S. 68 (b) or (c) of the Transfer of Property Act." As pointed out in the order of reference, once the mortgage money becomes payable under any clause in S. 68, there can be no reason for refusing to give effect to S. 67 which allows of a suit for foreclosure or sale "at any time after the mortgage money has become payable" except in certain cases of which this is not one.

I accordingly answer the question in the affirmative.

Ayling, J.:—I concur.

Kumaraswami Sastri, J. :—I agree and have nothing useful to add to what I have said in the order of reference.

A. S. V.

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1. (1891) I. L. R. 15 M. 174.
2. (1898) I. L. R. 21 M. 476.
3. (1916) I. L. R. 44 C. 388 s. c. 32 M. L. J. 39.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE SESHAGIRI AIYAR.

Ramanadhan Chetty ... *Appellant in both the appeals.* (Plaintiff in Small Cause Suits Nos. 1065 and 1067 of 1914 on the file of the Court of the District Munsif of Pattukottai).*

v.

Katha Velan and others ... *Respondents in Letters Patent Appeal Nos. 35 and 36 of 1916. Defendants in Small Cause Suit Nos. 1065 and 1067 of 1914 on the file of the Court of the District Munsif of Pattukottai.)*

Ramanadhan Chetty v. Katha Velan.

Promissory note—Right to sue on—Note in favour of person as trustee—Payee subsequently succeeded by another as trustee—Subsequent trustee's right to sue on note without endorsement or assignment—Trust Act, S. 75—Principle of—Applicability to public trusts.

Where a promissory note is executed in favour of a person as trustee of a charity and subsequently that person ceases to be trustee and is succeeded by another, the latter is entitled to sue on the note without any assignment or endorsement.

The principle of S. 75 of the Trusts Act, II of 1882, is applicable to public trusts.

Appeals under Clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Coutts Trotter dated the 20th December 1915 in Civil Revision Petitions Nos. 131 and 132 of 1915 praying the High Court to revise the decrees of the Court of the District Munsif of Pattukottai in Small Cause Suits Nos. 1065 and 1067 of 1914.

These Letters Patent Appeals coming on for hearing on Friday, the 24th day of November 1916.

The Court made the following

Order :—We must call for a finding as to whether at the time of the suit the right to collect monies due to the trust had devolved solely on the plaintiff.

Fresh evidence may be adduced, if desired. The finding will be submitted within two months from this date, and the parties

* L. P. A. Nos. 35 and 36 of 1916. 11th September, 1917.

Ramanadhan Chetty v. Katha Velan.

will be at liberty to file objections to the said finding within seven days after notice of the return of the same shall have been posted up in this Court.

In compliance with the above order of this Court, the District Munsif of Pattukottai submitted the following

Finding:—By an order in Letters Patent Appeals Nos. 35 and 36 of 1916 I was directed to take further evidence and remit a finding on the following question.

Whether at the time of the suit the right to collect monies due to the trust had devolved solely on the plaintiff?

The plaintiff has examined three witnesses in this connection and on the other side the 1st defendant has been examined. The oral evidence on behalf of the plaintiff is to the effect that sometime in 1913, the 2nd defendant handed over the management of the trust properties to the plaintiff. There is no positive evidence to contradict this nor do I see any reason to disbelieve the witnesses. I am also of opinion that the probabilities of the case favour this position. Exhibit B is an award which decides that each trustee was to be in management for a period of five years. Exhibits F1 and G1 are two promissory notes executed in favour of plaintiff in June 1914 in renewal of promissory notes executed previously in favour of the 2nd defendant. There is also no explanation as to how the documents Exhibit A in the present suit and Exhibits F, G, H came into the possession of plaintiff if the statement of the plaintiff's witness that it was on account of his succeeding the 2nd defendant as managing trustee is to be rejected.

On a consideration of the evidence in the case I find that at the date of these suits, the right to collect monies due to the trust had devolved on the plaintiff.

Mr. T. V. Gopalaswami Mudaliar for Appellant.

S. R. Muthusami Aiyar for Respondent.

The Court delivered the following

Judgment:—We must accept the finding that the promissory note sued on was executed to Ulagappa Chettiar as trustee of the charity. The question whether the said payee could alone have maintained the suit without joining his co-trustees was not raised in the Court below. It would depend in each case upon the powers and duties of the managing trustee whether such a person is competent to represent the trust solely. That question

has not been put in issue and we are not prepared to allow it to be debated now.

Another question which was argued at some length need not be discussed now, namely, whether if there is an assignment of the note by the act of parties, it should not be only in the mode prescribed by the Negotiable Instruments Act. There is a considerable conflict of opinion on this question and it can only be settled by a reference to a Full Bench.

The possibility of transfer of right in the note by operation of law has not been the subject of judicial pronouncements to any considerable extent. In this Presidency, apart from certain observations of Miller, J. in *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu* [1] the matter is *res integra.*

The Negotiable Instruments Act only deals with transfers by negotiation. Under the English Bills of Exchange Act the common law of the land is expressly saved (see S. 97). It is a pity that there is no such saving clause in the Indian Enactment. S. 57 of the Act, by implication, seems to contemplate that the legal representatives of a deceased person can negotiate a promissory note. The practice of allowing legal representatives in this country to sue on notes executed to their predecessors is apparently founded on the principle that the Act does not abrogate rules of devolution of rights in the properties of the deceased.

If a son, as legal representative, can sue on a note executed to his father, there could be no impediment in principle to other heirs or successors having a similar right. The case of trustees is, in some respects, stronger than that of other heirs. In the case of private trusts, S. 75 of Act II of 1882 enacts that the property standing in the name of the predecessor shall vest in the successor. It is not necessary to obtain a transfer by an instrument or by endorsement. We fail to see why this principle should not be extended to public trusts. In Byles on Bills it is stated, "The Executor of a deceased party to a bill or note has, in general, the same rights and liabilities as his testator". "The executors of every person", says Lord Macclesfield, "are implied in himself and bound without naming"................."On

1. (1908) I. L. R 31 M. 534.

Ramanadhan Chetty v. Katha Velan.

the death of the holder of a bill or note, his executors or administrators may indorse; and an indorsement by the executors or administrators is for all purposes as effectual as an indorsement by the deceased." The cases quoted by the author in support of the above propositions show that the English Bills of Exchange Act does not affect the common law right of devolution by operation of law. The same considerations are applicable to the construction of the Indian Enactment.

In *Catherwood* v. *Chaband* [1], it was held that a note given to an administrator as such can be sued on without assignment by an administrator *de bonis non* to the original estate. Bayley, J. points out that " the money recovered is applicable to the right fund, as assets of the first intestate". The case of a trustee replacing another stands on the same footing.

Broadly speaking, trustees exercise rights and obligations as agents of the trust. The trust being the owner, succeeding trustees derive their rights and office by relation to the trust and not as the heirs of the last holder of that office. All of them form a chain of representatives in respect of the trust, as was once said by the Judicial Committee. In this view, each trustee by virtue of his appointment takes up the management of the trust properties at the place left by the previous trustee. It is not necessary that the authority or consent of such a person should be given to the successor. As pointed out by Miller, J., in *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu* [2] the predecessor being *functus officio* would have no power to endorse the note given to him in a capacity which he was divested of. Consequently the present plaintiff who has replaced Ulagappa Chetty is entitled to sue on the note without any assignment or endorsement.

We are, therefore, of opinion that the decision of the learned Judge must be reversed and that of the Court below must be restored. Appellant will get his costs from the 2nd defendant in this Court.

A. S. V.

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1. (1823) 1 B. and C. 150.
2. (1908) I. L. R. 31 Mad. 534.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE KUMARASWAMI SASTRI.

Ammalu Ammal *alias* Parvathi Ammal. ... *Appellant* * *(2nd Plaintiff).*

v.

Namagiri Ammal and others ... *Respondents (Defendants).*

Ammalu Ammal *v.* Namagiri Ammal.

Promissory note by executor—Debt under note borrowed bona fide *in course of due administration—Creditor's rights—Right of direct recourse against estate—Right to be subrogated to executor's rights—Suit on promissory note—Right to subrogation if and when can be allowed in—Necessary allegations in plaint—Promissory note by executor, trustee, guardian or agent—Executant when personally liable under, and when not—Promissory note for debt—Suit on debt—Maintainability—Debt and note contemporaneous — Effect—Practice—Pleadings—Prayer for larger relief—Lesser relief to which plaintiff found entitled when will be granted and when not.*

In a suit on a promissory note executed by an executor for a debt borrowed by him *bona fide* in the due course of administration of the estate, the creditor cannot have any direct claim against the testator's estate and cannot have anything higher than a claim to be subrogated to the right of the executor to retain or receive amounts from the estate necessary to indemnify the executor against loss. This claim to be subrogated is, however, of no value if the executor had no such right to retain or receive any amounts from the estate; in other words, if it could be shown that the executor has to account to the estate for a sum not less than that in respect of which he has the right to be indemnified.

Plaintiff sued to recover Rs. 4,534 and odd due under a promissory note executed by the deceased, K, the widow and executor under the will of one N. In the suit four persons were made defendants, being another widow, two daughters, and a daughter's son of N. The case for plaintiff was that the suit note was executed in respect of monies borrowed by K *bona fide* in the due course of administration of the estate of N and that defendants 1 to 4 who had taken the testator's property and defendants 2 to 4 who had succeeded to K's properties were liable.

Held, by *Sadasiva Aiyar and Kumaraswami Sastri, JJ.*, that plaintiff had no direct right to proceed against the estate and that his only right was to be subrogated to the rights of K.

The learned Judges, however, differed on the question whether, in the suit as framed, plaintiff ought to be allowed to claim to be subrogated to K's right and whether the suit ought to be remanded for deciding whether K had lost her right to reimbursement out of the estate in respect of the amount of the promissory note sued on:

Held by Sadasiva Iyer, J, whose opinion prevailed under S. 98 of the Code of Civil Procedure, plaintiff ought not to be allowed to do so because (a) the plaint did not say that K had any claims against her husband's estate and did not pray that by reason of her right to indemnity, N's heirs should be made liable to plaintiff for that indemnity amount to the extent of the assets of that estate in their hands and (b) the plaint allegations that K was executrix and borrowed under the suit note *bona fide* in the due course of administration of the estate were insufficient to justify the passing of a decree against the estate or the heirs of N.

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* S. A. No. 1494 of 1915. 7th April, 1917.

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Quære whether the Indian Procedure allowed such a claim against N's heirs to be joined to and tried in the suit brought on the promissory note against K's heirs.

Held by Kumaraswami Sastri, J : plaintiff's claim ought to be allowed because (*a*) the merits were all in plaintiff's favour, (*b*) all persons claiming under the will of N or in any way interested in the estate were parties to the suit, (*c*) a separate suit might be barred, and, (*d*) the Indian Procedure did not prevent the question from being enquired into and determined as an issue in the suit as framed.

A party claiming a larger relief ought not to be denied relief which can properly be granted unless the ground on which the lesser relief can be granted is inconsistent with the case of the plaintiff as set out in the pleadings or would lead to the determination of issues which would embarrass the defendants or necessitate the addition of parties or unless the claim of the plaintiff is unconscionable and the court is unwilling to stretch a point in his favour.

Per *Sadasivaiyar, J* : Where a loan is practically contemporaneous with and is, when made, intended to be evidenced by a promissory note, a suit on the debt apart from the promissory note is not sustainable.

In a suit on a promissory note executed by a trustee or an executor who does not however sign as trustee or executor, there can only be a personal decree against the executant, or, if the executant is dead, against his or her legal heirs, and there cannot be a decree against the trust estate or the testator's heirs.

Per *Kumaraswami Sastri, J* : A person executing a negotiable instrument will be personally bound thereby unless there is clear indication that he does not intend to incur any personal liability but limits recourse of the payee or holder to the person whom or the estate which he represents either as trustee, executor, guardian, or agent.

Quære as to the words or recitals necessary for so limiting liability.

Second Appeal against the decree, dated 19th April 1915 of the District Court of Madura in Appeal Suit No. 365 of 1913 preferred against the decree of the Court of the Subordinate Judge of Madura in Original Suit No. 94 of 1912.

A. Krishnaswami Aiyar for Appellant.

C. S. Venkatachari and V. K. Srinivasa Aiyangar for Respondents.

The Court delivered the following

Kumaraswami Sastri, J.

Judgment:—*Kumaraswami Sastri, J.*—The plaintiff who is the appellant sued to recover Rs. 4,534-13-3 alleged to be due on a promissory note executed by the deceased Kothai Ammal, the widow and executrix under the will of one Narasimhachari who died leaving another widow, two daughters and a daughter's son (defendants 1 to 4 respectively). The case for the plaintiff is that the promissory note sued on was executed in respect of moneys borrowed by the executrix to pay the legacy due to the 3rd defendant and that defendants 1 to 4 who have taken the testator's property and defendants 2 to 4 who have succeeded to Kothai Ammal's

properties are liable. Various defences were raised but it is only necessary to consider the plea that the executrix had no power or necessity to borrow so as to bind the estate of the testator and the plaintiff can only proceed against Kothai Ammal's heirs and the assets in their hands.

The Subordinate Judge held that under the terms of the will the proceeds of the life policy (referred to in paragraph 8 of the will) were specified as the fund out of which the legacy was to be paid, that there was no necessity to borrow and that the estate of the testator was not bound to satisfy the amount due on the promissory note. He passed a decree against Kothai Ammal's legal representatives. On appeal the District Judge confirmed the decree on the ground that plaintiff did not prove any necessity for the loan.

It is argued for the appellant that both Courts were wrong in viewing the case solely from the standpoint of necessity that the powers of an executor to borrow monies for the purposes of administration of the estate are wider than those of an administrator, that the indication of a fund in the will out of which the legacy was to be paid does not prevent it from being otherwise discharged, if the fund is not immediately available and that so long as the executor borrows money *bona fide* in the due course of administration he is entitled to a right of retainer which can be availed of by the creditor whose loan has been applied to the payment of sums payable out of the estate. It is also argued that the creditor has a direct right to proceed against the estate as he cannot be in a worse position than the creditor who has lent moneys to the managing member of a joint family or to a trustee of a temple or the guardian of a minor for necessary and binding purposes.

Before dealing with the above contentions it is necessary to refer to the important clauses in the will and certain proceedings prior to the execution of the promissory note sued on. Paragraph 3 of the will directs the executrix to deliver at once to the testator's daughter Ranganayaki (3rd defendant) the share in the Arasaven village which the testator had acquired for her benefit and pay her Rs. 3,000. In paragraphs 2, 4 and 7 the testator directs payment of Rs. 1,000 to his grandson Govindarajan (4th defendant), Rs. 50,000 to his widow (1st defendant) in case, the testator left no sons (a contingency which happened and entitled her to the

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bequest) and Rs. 4,000 to his daughter-in-law. Clause 8 directs the executrix to get from the Oriental Life Assurance Company the sum of Rs. 8,000 payable in respect of the life policy taken out by the testator and to pay his debts and the legacies specified above. It is clear on the face of it that all the legacies could not be paid out of the insurance monies even if there were no debts to be paid and that the executrix must have had recourse to other properties of the testator in order to pay them. I may add that Exhibits D and E show that the testator had debts to pay and that a decree for Rs. 11,558 and odd was passed against the executrix and all the present defendants.

Soon after the testator's death Namagiri Ammal (1st defendant) filed O. S. No. 14 of 1909 for her share under the will and the executrix contested the suit *inter alia* on the ground that the legacy to her was only Rs. 5,000, the sum of Rs. 50,000 being a fraudulent alteration in the will. A razinamah Exhibit C was filed which provided for payment of a certain sum to Namagiri Ammal (plaintiff in the suit) for collection by the executrix of debts due to the estate and the amount due on the life policy and the payment by her of the debts due by the estate including the legacy of Rs. 3,000 payable to Ranganayaki; the plaintiff being indemnified against non-payment by the executrix. Some stress has been laid on the words "the 1st defendant alone shall pay all debts etc". It is clear that reading it with the other clauses of the razinamah the intention was not to transfer to the executrix personal liability for all the testator's debts and legacies so as to absolve the estate from payment of the same but to prevent it being said subsequently by the other parties that the co-widow (the plaintiff in that suit) by reason of her having taken the properties given to her for her share was liable to pay anything or that the properties she took should in any way be charged with or made liable for payment of their claims. It is not suggested that the razinamah was not a *bonafide* and proper adjustment of the differences between the executrix and her co-widow.

After the razinamah Ranganayaki Ammal, the daughter of the testator (3rd defendant.) was pressing for payment of the legacy and threatened legal proceedings. The 1st defendant at that time was not able to recover the sum due on the policy. The terms of clause 3 of the will were specific and directed that Rs. 3,000 was to be paid at once and having regard to the fact that

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the legacy would have been payable even if the policy monies became irrecoverable the situation was not as clear as the Subordinate Judge thinks it was. The executrix who was threatened with a suit for the legacy, borrowed Rs. 3,500 and executed the pronote sued upon on the 9th December 1909. It recites that the sum of Rs. 3,000 was borrowed for the purpose of paying Ranganayaki who was entitled to the same both under the will and the razinamah (above referred to) and Rs. 500 to discharge the *othi* referred to in the will. It was signed by Kothaiammal without any description or qualification and so far as the note is concerned except for the recital that the debt was contracted for purposes of carrying out the directions contained in the will there is nothing to exclude or to limit the personal liability of the executant or to indicate that she charged the estate with payment.

It is well settled that a person executing a negotiable instrument will be personally bound thereby unless there is clear indication that he does not intend to incur any personal liability but limits recourse of the payee or holder to the person whom or the estate which he represents either as trustee, executor, guardian or agent. There may be a difference of opinion as to the words or recitals necessary for so limiting liability; but the principle is clear. I need only refer to *Koneti Naicker* v. *Gopala Aiyar* [1] and *Sundaresa Gurukal*, v. *Sambasiva Aiyar* [2]. In the case of executors the view taken by Warrington, J., in *Watling* v. *Lewis* [3] that the words "as such trustees but not so as to create any personal liability on the part of either of them" were void and repugnant as there was a covenant to pay and an indemnity, was not followed in *Gant* v. *Hobbs* [4] where it was held following *Muir* v. *City of Glasgow Bank Ltd.*[5] and *Gordon* v. *Campbell* [6] that the words "as such trustees and not otherwise" did not render them personally liable.

In the present case it is clear that the executrix for the purpose of paying the legacy due to the testator's daughter borrowed moneys on the promissory note sued on without limiting her liability charging the estate or any part thereof with payment of the sum borrowed. The question is how far and subject to what limitation can the creditor proceed to realise his debt by proceeding against the estate in case the personal liability is insufficient.

1. (1913) I. L. R. 38 M. 432.
2. (1915) 2 L. W. 188.
3. (1911) L. R. I. Ch. 414.
4. (1912) L. R. I. Ch. 717, 720.
5. (1879) L. R. 4 A. C. 337.
6. (1842) 1 Bell. Sc. App. 428.

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Where an executor or an administrator has been dealing with the assets or making contracts *bona fide* in the due course of administration in his character as executor or administrator, the question whether on contracts personally entered into by him he should be sued in his character as legal representative so as to enable the creditor to pursue his remedies directly against the estate or in his personal character, the creditor being afterwards left to work out his rights by being subrogated to the executor's right of retainer or indemnity has been dealt with in numerous cases.

The authorities which I shall refer to show that (1) ordinarily a decree *de bonis testatoris* will be passed in all cases where the testator is personally liable or the contract of the executor arises out of a contract with or something done by the testator and that in all other cases the only decree that will be passed is a decree *de bonis proprius*: (2) an executor will in the absence of an express stipulation be personally libable on all contracts entered into or debts incurred subsequent to the death of the testator: (3) creditors cannot have any direct remedy against the testator's estate or proceed in execution against the assets except in cases where a specific charge is validly created or the debts are incurred in pursuance of directions to carry on a trade or business or where a specific trust is created for a specific purpose and debts are incurred in the due carrying out of the trust: (4) an executor who has incurred liabilities or spent moneys in the due course of administration is entitled to the right of exoneration, indemnity or retainer as against the estate : (5) a creditor who has no legal claim against the estate is entitled in equity to enforce on his own behalf the aforesaid rights of the executor while he also retains his legal claim against the executor personally: (6) The right to be subrogated is, subject to any defence which would be available against the executor and is confined to the assets which the executor could have resorted to for an indemnity : (7). The mere fact that a debt was incurred by the executor in the due course of administration and that the estate was benefitted or enriched by the loan would make no difference and would give the creditor no direct recourse.

In *exparte Garland*,[1] it was held that where an executor carries on business after the death of the testator he is entitled to be indemnified out of the assets which are authorised to be or can be otherwise properly applied for the purpose of the business and

1. (1804) 10 Vesey. 110, 121.

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that in such cases creditors are entitled to stand in the place of the executor or administrator and to claim that the fund out of which he is entitled to indemnity shall be applied in payment of their debt. A similar view was taken in *Dowse* v. *Gorton* [1] where it was held that the creditor of the executor or trustee is entitled to the benefit of the indemnity which the executor or trustee is entitled to in cases where any part of the estate is authorised to be applied for the purpose of carrying out the business specified in the will. In *Raybould* v. *Turner* [2] the principle in *Dowse* v. *Gorton* [1] was extended to damages which a trustee has to pay. The following observations of Byrne, J., put the matter very clearly : " *Benett* v. *Wyndham* [3] goes to show that if a trustee in the course of ordinary management of his testator's estate either by himself or his agent does some act whereby some third person is injured and that third person recovers damages against the trustee he is, if he has acted with due diligence reasonably entitled to be indemnified against the testator's estate. When once the trustee is entitled to be thus indemnified out of the trust estate I cannot myself see why the person who has recovered judgment against the trustee should not have the benefit of this right to indemnity and go direct against the trust estate or asset as the case may be just as an ordinary creditor of a business carried on by a trustee or executor has been allowed to do". In *Fairland* v. *Percy* [4] letters of administration as a creditor in equity were granted to a person who had contracted with an executor authorized to carry on business on the ground that where business is carried on by an executor under a will which directs that it might be carried on with the assets left by the testator creditors of the business who have had transactions with the executor have in addition to the personal remedies against the executor the right in equity to claim against the estate of the testator to the same extent that he authorised it to be used in the business. In *Smith* v. *Shorey* [5] a creditor of the executor was held to be entitled to a decree for the administration of the testator's estate when the executor was authorised to carry on business. In *Davies Banks & Co.* v. *Beavon* [6] the right of subrogation was allowed to a creditor who paid off debts incurred by the guardian for necessaries supplied to the lunatic. Neville, J., observed as follows :—" It appears to me

1. L. R. (1891) A. C. 190.
2. (1900) L. R. I. Ch. 199.
3. (1862) 4. D.-F. and J. 259=45 E. R. 1183.
4. (1875) L.R. 3 P. & D. 217.
5. (1898) 79 L. T. 349.
6. (1912) L. R. 1 Ch. 197.

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that no legal right arises as a result of the lending in favour of the lender; but I think an equity arises and that, that equity is to stand in the shoes of those creditors who being creditor for necessaries supplied for the maintenance of the lunatic have been paid out of the moneys advanced by the lender. Where however there is no authority given to the executor or administrator to carry on any trade or business, debts incurred by the executor are treated only as the executor's personal debts and the creditors to whom the debts are owing have been given no direct remedy against the testator's estate either by proving against the estate or taking the asset in execution. In *Farhall* v. *Farhall* [1] James, L. J., was of opinion that neither authority nor principle was in favour of the view that an executor can by borrowing money enable the person who lent it to stand as a creditor to the estate even though the moneys were borrowed for the purpose of the estate. Mellish, L. J., took it to be settled law that "upon a contract of borrowing made by an executor after the death of the testator the executor is only liable personally and cannot be sued as executor so as to get execution against the assets of the testators." In *Strickland* v. *Symons* [2] Selbourne, L. J., observed that "there is no principle or authority for saying that if a trustee makes himself personally liable for goods the creditor thereby obtains a lien on the trust property or can have equitable execution against the trust estate in respect of a judgment against a trustee." In *Evans* v. *Evans* [3] Cotton and Lindley, L. C., were of opinion that the creditor cannot have any direct claim against the estate or be entitled to anything higher than a right to be subrogated to the rights of the administrator to the indemnity. In *Labouchere* v. *Tupper* [4] a similar view was taken by the Privy Council and it was held that an executor of a trader carrying on the trade after his death was personally liable for all the debts contracted in the trade and that the propriety of his conduct as between himself and the beneficiaries did not give the creditors the right to be treated as creditors of the testator or give them a charge on the assets.

It is no doubt true that Bayley, J., in *Ashby* v. *Ashby* [5] pointed out the hardship that might arise in individual cases and Lord Tenterdon, C. J., expressed an opinion that if the matter were *res integra* it may be as well to hold that the lender may elect to treat

1. (1871) L R. 7 Ch. Ap. 123
2. (1884) 26 Ch. D. 244.
3. (1887) 34 Ch. D. 597.
4. (1857) 11. Moore's. P. C 198.
5. (1827) 7 B. and C. 444

the receipt of money as an act done by the executor in his character as executor and to take his chance whether he will be paid out of the assets or not; and that in *Farhall* v. *Farhall*[1] Bacon, V. C., inclined to the view that *Ashby* v. *Ashby*.[2] and other cases recognised the rule that a demand may exist against the executor both *de bonis testatoris* and *de bonis propriis* and that there may be a right to proceed against the goods of the testator by reason of transactions with executor but in *Farhall* v. *Farhall* [3] the decision of Bacon, V. C., was reversed by Lords Justices Mellish and Cotton with the observations already referred to by me and the remarks of Byles, J., were explained as being confined to cases where the matter arose out of a contract with or something done by the testator.

Some Courts in the United States of America have taken the view that creditors ought to be allowed to recover against the estate to the extent to which it has been benefited or enriched by a debt which has been properly incurred in the due course of administration but the rule has not found favour in other states which follow the rule laid down by the English decisions referred to by me.

There is a great deal to be said in favour of the view that direct recourse ought to be given at least to the extent to which the estate has been enriched, where debts borrowed in the due course of administration benefit the estate but the question is settled by authority both English and Indian.

Turning to cases in India Sale, J., in *Romanath Paul* v. *Kanai Lal Dey* [4] following *Farhall* v. *Farhall* [3] held that apart from any special power given by a will to an executor money borrowed by him on a promissory note for the benefit of the estate is not a charge on the estate. In I. L. R. 28 Cal. 575 (*Re Shard*) the same learned Judge following *Re Johnson* [5], *Strickland* v. *Symons* [6] and *Raybould* v. *Turner* [7] held that the mere fact that the trustee rendered himself personally liable in carrying out the trust would not give the creditors the right to proceed against the trust property. In *Bridge* v. *Madden* [8] the decision in I. L. R. 28 Cal. 575 was approved of and it was held that the creditor who

1. (1871) L. R. 12 Eq. 98.
2. (1827) 7 B. and C. 444.
3. (1871) L. R. 7 Ch. Appeals 123.
4. (1894) 7 C. W. N. 104.
5. (1880) 15 Ch. D. 548.
6. (1884) 26 Ch D. 245.
7. (1900) 1 Ch. 199.
8. (1904) I. L. R. 31 Cal. 1084.

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supplied goods to a trustee authorised to carry on business is entitled to the trustee's right of indemnity if the trustee has not through his default lost the right. In *Byramji Rustomji* v. *Heerabai* [1] Scott, C. J., observed that "it was clear that on a claim for money lent to executors they are liable personally and a judgment cannot be directed against the asset of the testator." The creditor was only subrogated to the right of the executor and was not allowed to attach the property belonging to the estate though he lent money to pay off a debt due by the testator. In *Swaminatha Aiyar* v. *Sreenivasa Aiyar* [2] Abdur Rahim and Spencer, JJ. following *Re Johnson* [3], *Strickland* v. *Symons* [4] and I. L. R. 28 Cal. 575 held that a creditor who lent money to a trustee was not ordinarily entitled to have his debts realised out of trust properties but was only entitled to be subrogated to the trustee's right of indemnity against the trust. In *Krishnamoorthy* v. *The Bank of Burma*, [5] Wallis, C. J., in dealing with cases where business was carried on behalf of a minor referred to *Labouchere* v. *Tupper* [6], *In Re Johnson* [3] and *Evans* v. *Evans* [7] and was of opinion that the creditors were only entitled to be subrogated to the guardian's rights of indemnity and lose the right to proceed against the assets embarked on the business when the guardian owing to misconduct lost the right to be indemnified.

My attention has been called by Mr. Krishnaswami Iyer to cases where persons who lent moneys to (1) the guardian of a minor, (2) the managing member of an undivided family and (3) the head of a religious Endowment were allowed direct recourse against the estate of the minor and the trust property. In *Krishnan Chettiar* v. *Nagamani Ammal* [8] it was held by Seshagiri Aiyar and Napier, JJ., that a negotiable instrument executed by the guardian of a minor for purposes binding on him is enforceable against the minor's estate and in *Nataraja Naicken* v. *Ayyasami Pillai*, [9] Ayling and Seshagri Aiyar, JJ., held that a promissory note executed by one brother in respect of a loan contracted for necessary purposes binds the other brothers also and treated. *Kutti Ammu* v. *Purushottam Dass* [10] as overruled by the decision of the Privy

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1. (1909) 11 Bom. L. R. 250.
2. (1916) 32 M. L. J. 259.
3. (1880) 15 Ch. 548.
4. (1884) 26 Ch. D. 245.
5. (1911) 21 M. L. J. 620.
6. (1857) 11 Moore's P. C. cases 198.
7. (1887) 34 Ch. D. 597.
8. (1915) I. L. R. 39 Mad. 915.
9. (1916) 5 L. W. 410.
10. (1911) 21 M. L. J. 526.

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Council in *Karmali Abdulla* v. *Karimji Jiwanji* [1]. Both the decisions proceed upon special principles of Hindu Law and the position of the guardian of a Hindu minor or the managing member of an undivided family affords no striking analogy to that of an executor under a will on whom the whole estate of the testator vests by virtue of S. 4 of the Probate and Administration Act and who completely represents it.

As regards heads of Religious Endowments the authorities are not uniform. In *Srimath Daiva Sikamani Pandara Sannadhi* v. *Noor Mohammed Rowthan* [2] it was held that Mutt properties were liable in the hands of its holder for debts contracted by his predecessor-in-title for necessary purposes even though no express charge was created and a similar view was taken in *Nataraja Desikar* v. *Karutha Rowthen* [3]. But in *Swaminatha Aiyer* v. *Srinivasa Aiyar* [4] it was held that the creditor was only entitled to be subrogated and could not have his debts realized out of trust properties and Abdur Rahim and Spencer, JJ., were not prepared to follow *Srimath Daiva Sikhamani Pandara Sannadhi* v. *Noor Mohamed Rowthan* [2] if it laid down a contrary view. There is also a considerable divergence of opinion as to the exact position of the head of a religious endowment and the analogy which is to be applied in dealing with debts contracted by him. In some cases the analogy applied was that of a manager of an infant heir and in others the widow in possession of her husband's Estate (*see Srimath Daiva Sikhamani Pandara Sannadhi* v. *Noor Mahomed Rowthan* [2]; *In the matter of the Second Grade Pleaders* [5]; *Zamindar of Kapileswarapuram* v. *Secretary of State* [6]; *Hossim Ali Khan* v. *Mahanta Bhagban Das* [7]). The Full Bench decision in 33 Madras 265 to the effect that the position of the head of a mutt should be determined in each case on the conditions of the grant or usage of his mutt and that it cannot be predicated of the head of a mutt that he is either a life tenant or trustee makes it difficult to treat the decision in a particular case as of general application as regards trustees of secular trusts in the absence of knowledge of the facts of each particular case. No case has been cited where direct recourse was allowed to an executor or secular trustee falling under the Trusts

1. (1915) I. L. R. 39 Bom. 261.
2. (1907) I. L. R. 31 Mad. 47.
3. (1910) 21 M. L. J. 129.
4. (1916) 32 M. L. J. 259.
5. (1910) I. L. R. 34 Mad. 35.
6. (1910) I. L. R. 37 M. 356.
7. (1906) I. L. R. 34 Cal. 249

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Act and so far as I can see the authority of the English and Indian decisions referred to by me has not been questioned in any of the Madras decisions.

I am of opinion that the plaintiff in the present case is entitled to be subrogated to the rights of the executrix as the loan evidenced by the promissory not was contracted to pay the legacy directed in the will to be paid to the 3rd defendant and to discharge the balance of the *othi* referred to in the will. It is clear that the executrix would have been entitled to payment of Rs 3,500 out of the estate if she had paid the legacy and discharged the *othi* out of her funds and it makes no difference that she borrowed the money from another, so long as the rights of the creditors are made subject to the state of accounts between the executor and the estate. Both the Lower Courts have not dealt with the claim of the plaintiff against the estate from the right stand-point and have failed to deal with the plaintiff's right to be subrogated to the executor's right of repayment out of the estate.

It has been argued on the strength of *Swaminatha Aiyar* v. *Srinivasa Aiyar*[1] that the plaintiff is not entitled to relief on this footing as he did not ask to be subrogated but claimed direct recourse. I am of opinion that the fact that the plaintiff claimed the larger right to proceed against the assets of the testator as if he was a person entitled to the right of direct recourse would not prevent the Court from granting a lesser relief by subrogating him to the executor. I do not think the learned Judges intended to lay down a hard and fast rule that in no case should the Court grant the lesser relief by subrogating the plaintiff to the rights of a trustee when he claims the right of direct recourse. If the decision is capable of such a construction I would respectfully dissent from it. The case may however be distinguished on the ground that there was observed by the learned Judges nothing in the plaint to show that the temple was liable whereas in the present case the plaintiff distinctly sought to make the *estate of the deceased in the hands of the defendants liable* (see prayer 3 of the plaint). His mistake was to claim direct recourse and not sastisfy himself by getting the lesser right of being subrogated to the executor. It is a well recognized rule that a party claiming a larger relief ought not to be denied relief which can properly be granted unless the ground on which the

1. (1916) 32 M. L. J. 259

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lesser relief can be granted is *inconsistent* with the case of the plaintiff as set out in the pleadings or would lead to the determination of issues which would embarrass the defendants or necessitate the addition of parties. Sometimes when the claim of the plaintiffs is unconscionable, Courts have declined to stretch a point in his favour but a just claim ought not to be defeated by technical considerations based on plaintiff having asked for more than he is legally entitled especially in cases where owing to the conflict of authorities and the want of precedents, the law is not quite clear.

There is so far as I can see nothing in the various decisions referred to by me or in the provisions of the Civil Procedure Code which prevents the question from being enquired into and determined as an issue in the suit. It is no doubt open to the party to move by Judge's Summons in cases where the rules of the original side apply (as was done in *Bridge* v. *Madden* [1]) or to file a separate administration suit after judgment obtained against the executor personally or to apply for letters of administration *de bonis non* in case where the executor dies without having fully administered the estate. These remarks do not exclude the right of having the matter adjudicated in the suit itself and the policy of the Civil Procedure Code is to prevent a multiplicity of suits and to avoid the leaving for determination in proceedings subsequent to the decree of matters which may be conveniently decided in the suit. The doctrine of subrogation is an equitable doctrine the basis of which is the doing of "complete essential and perfect justice without technicalities as to form or procedure" except where substantial hardship will arise to the defendants.

Turning to the merits they are all in plaintiff's favour. There can be no doubt that the money was lent to pay a legacy due and the residuary estate has been enriched to the extent. The executrix is dead and all persons claiming under the will or in any way interested in the estate are parties to the suit. It is probable that a separate suit will be met by the plea of limitation and any additional trouble that the parties may be put to can be easily compensated by costs. If the executrix did not lose her right of indemnity there is absolutely no reason why the legatees and heirs of the testator should profit at the expense of the plaintiff.

I do not think the fact that the suit is based on a promissory note makes any difference. The plaintiff is only seeking to work

1. (1904) I. L. R. 31 C. 1084.

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out the rights of the *executant* of the promissory note and the fact that the working out of the right would make others liable does not contravene any of the provisions of the Negotiable Instruments Act. Subrogation does not necessarily rest on contract or privity. In *Krishnamurti* v. *The Bank of Burma Ltd* [1]. which was a suit on a negotiable instrument executed by the guardian of a minor, Wallis, C. J., was of opinion that the right of the creditor to proceed against the minor's estate was based on the doctrine of subrogation.

I would set aside the decree of the Lower Court in so far as it dismisses the claim of the plaintiff to proceed against the defendants by reason of their being in possession of the estate of Narasimha Chari and remand the suit to the Subordinate Judge to decide the question whether Kothai Ammal the executrix has lost her right to reimbursement out of the estate in respect of the sum of Rs. 3,500 borrowed by her on the promissory note sued on if any and if so what entent. If it is found that she has the right, plaintiff will to that extent be entitled to proceed against the estate. Costs in the Lower Court and appeal will abide and follow the result.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J :—I have had the great advantage of a study of the very instructive opinion (if I may be permitted to say so) just now pronounced by my learned brother before preparing my own opinion.

The suit was brought on the promissory note executed by the executrix and not on the debt evidenced by it. On the question whether, when the promissory note and the debt are contemporaneous, you can sue on the debt apart from the promissory note, there is a difference of opinion in this Court, and, speaking for myself, I adhere to the opinion which I expressed in *Muthu Sastrigal* v. *Visvanadha Pandhara Sannadhi* [2] that, where the loan is practically contemporaneous with and was, when made, intended to be evidenced by the promissory note, the claim could only be made on the note. Where the claim is so made on the promissory note which is a negotiable instrument and where the trustee or the executor does not sign as trustee or executor, the authorities are, in my opinion, clear that there can only be a personal decree against the executant or if the executant is dead, against his or her legal heirs and there cannot be a decree against the trust estate or the testator's heirs.

1. (1911) 21 M. L. J. 620. 2. (1913) 26 M. L. J. 19.

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Assuming however that the creditor can sue on the debt (apart from the note) even in such a case, the authorities (See *Strickland* v. *Symons* [1] —*Re Johnson* [2], *Re Shard* [3] *Evans* v. *Evans* [4], show that the creditor cannot have any direct claim against the testator's estate and that he cannot have anything higher than a claim to be subrogated to the right of the executor to retain or receive amounts from the estate necessary to indemnify the executor against loss. This claim to be subrogated is, however, of no value if the executor had no such right to retain or receive any amounts from the estate; in other words, if it could be shown that the executor has to account to the estate for a sum not less than that in respect of which he has right to be indemnified. Now how and when is this relief to be obtained by the creditor? The procedure of the English Courts of equity is not the procedure by which Indian Courts are to be guided. I am not very familiar with the English procedure either of the Common Law Courts or of the Equity Courts in suits or execution proceedings. It appears from the decision in *Evans* v. *Evans* [4] that the creditors in that case wanted to proceed against the intestate's properties for a debt incurred by his administratrix after his death in connection with a business which the intestate had carried on. They proceeded by *application in the administration action* brought by the intestate's infant child and in which action, the assets of the estate were being administered. But the present suit is *not* an administration action; there is no administration suit or decree before us and this suit cannot be treated as an application in an administration action. In *Raybould* v. *Turner* [5], the remedy of proceeding against the estate on the basis of the trustee's right of indemnity was sought *after the passing of* a *personal decree* against the trustee by taking out in the Chancery Division a fresh "summons for the purpose of enforcing" the claim against the testator's estate. Here, we are asked to give a *decree* in the first instance against the heirs of the testator.

As regards *Srimath Daiva Sikhamani Pandara Sannadi* v. *Noor Mohamed Rowthan* [6] (which was *not* a suit on a negotiable instrument), it has been dissented from in *Swaminatha Aiyar* v.

1 (1884) 26 Ch. D. 245.
2. (1880) 15 Ch. D. 548.
3. (1901) I. L. R. 28 Cal. 574.
4. (1887) 34 Ch. D. 597.
5. (1900) 1 Ch. 199.
6 (1907) I. L. R. 31 Mad. 47.

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Srinivasa Aiyar [1]. That case can also be distinguished (as pointed out by my learned brother) on the ground that it related to a Religious Trust and not to a secular trust.

As regards the cases in *Krishnan Chettiar* v. *Nagamani Ammal* [2] and *Nataraja Naiken* v. *Ayyasami Pillai* [3], I do not think it necessary to express a final opinion as to the correctness of both or either of them as the decisions therein depended upon the application of the Hindu Law of joint family and of guardianship which the learned Judges who decided those cases considered to be applicable to even suits on negotiable instruments. The question whether a partner is liable on negotiable instruments executed by another partner for the needs of the partnership is also governed by different considerations based on the law of partnership as à branch of Mercantile Jurisprudence. (*See Karmali Abdula* v. *Karimji Jiwanji* [4].)

The plaint in the present case *does not state that the executrix and her heirs were entitled to take or retain any sum from the estate as indemnity and does not pray for a declaration that the plaintiff in execution is entitled to proceed against the properties of the late Narasimhachary in the hands of his heirs direct to the extent of such indemnity.* In *Swaminatha Aiyar* v. *Sreenivasa Aiyar* [1] the learned Judges when requested by the appellant in a similar case to order an enquiry as to whether the trustee was entitled to recover any money from the trust estate by way of indemnity and to make the trust estate liable for the plaintiff's debt to that exent observed as follows :—"But there was no allegation whatever in the plaint nor was any question raised by the issue that the temple was indebted to the 1st defendant. We do not think that it would be the right course in this suit to order any such enquiry as has been suggested. *It may be that Mr. Anantakrishna Aiyar's client has a remedy by a suit properly framed against the trust property if as a matter of fact, the trust property is liable to the 1st defendant on a proper account being taken.*" The learned Judges accordingly dismissed the Secoud Appeal with costs. I think these observations apply aptly to the present case also, where the plaint does not say that Kothai Ammal had any claims against her husband's estate and does not pray that by reason of her right to indemnity, Narasimhachary's

1. (1916) 32 M. L. J. 259.
2. (1915) I. L. R. 39 Mad. 915.
3. (1916) 5 L .W. 410.
4. (1915) I. L. R. 39 Bom. 261.

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heirs should be made liable to the plaintiff for that indemnity amount to the extent of the assets of that estate in their hands. The only basis alleged in the plaint for the claim against Narasimha Chary's heirs is that Kothai Ammal was his executrix and she borrowed from the plaintiff under the promissory note to pay up a legatee under Narasimha Chary's will. Those allegations are insufficient according to the authorities to justify the passing of a decree against the estate or heirs of Narasimhachary. Of course, if there is any debt due to Kothai Ammal and her heirs by the heirs of Narasimhachary, there are the provisions of the Civil Procedure Code for attaching those amounts in execution of the decree now passed against the heirs of Kothai Ammal. But an enquiry just now into the indebtedness of the estate to Kothai Ammal or its liability to indemnify Kothai Ammal seems to me to be opposed to the authorities and not to be warranted by the allegations made in the plaint as the basis of the plaintiff's claim. I regret therefore that I have the misfortune to differ from my learned brother as regards the final order to be passed in this appeal. I would have been glad if I could distinguish this case from *Swaminatha Aiyar* v. *Srinivasa Aiyar* [1] where Abdur Rahim and Spencer, JJ. refused to allow in Second Appeal the question of the plaintiff's right to be subrogated to the indemnity of the trustee to be raised or decided in the suit out of which that second appeal arose. I however, find myself unable to do so. The plaintiff could, if he wanted his claim to be satisfied from Narasimhachary's estate (and not to be a claim against Kothai Ammal personally), have made Kothai Ammal sign the promissory note as executrix or obtained a charge from her on that estate. If he wanted to be subrogated to her right to indemnity and to have the extent of it ascertained, he should have framed his plaint in the present suit accordingly (assuming that the Indian Procedure allows such a claim aginst Narasimha Chari's heirs to be joined to and tried in the same suit brought on the promissory note against Kothai Ammal's heirs). It may be argued that the decision in *Swaminatha Aiyar* v. *Srinivasa Aiyar* [1] refusing to allow the plaintiff's claim to be subrogated to the trustee's right took a rather technical view of the pleadings. But several difficult questions have arisen in this case, (a) as to the extent of the right of subrogation of the personal creditors of an executor or trustee in India, (*b*) as to whether such right can be claimed in

1. (1916) 32 M. L J. 259

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a suit on a negotiable instrument executed by the trustee or executor in his personal capacity, (c) as to the nature of the proceedings in which the existence and the extent of the right of subrogation should be tried and ascertained (it may be that some new rules of procedure might have to be invented by the Indian Courts in the mofussil to have the question tried and decided as the matter is left in a rather nebulous state by the Indian decisions). It appeared to me therefore that it is very desirable if all these questions could be considered by a Full Bench, it might be so considered, and as it is likely that there would be a Letters Patent Appeal from my decision dismissing the Second Appeal (which prevails under Section 98 of the Code of Civil Procedure). I have thought it best to follow what I consider to be the principles of the decision in *Swaminatha Aiyar* v. *Srinivasa Aiyar* 1 and to dismiss therefore this Second Appeal with costs (only one set).

A. S. V.

PRIVY COUNCIL.

PRESENT :—LORD DUNEDIN, LORD SHAW, LORD SUMNER, SIR JOHN EDGE AND MR. AMEER ALI.

[On Appeal from the Chief Court of Lower Burma.]

Maung Kyin and another ... (*Defendants*-Appellants.*)

v.

Ma Shwe La and others ... (*Plaintiffs-Respondents*).

P. C. — Maung Kyin v Ma Shwe La.

Indian Evidence Act, 1872, *Ss.* 92, 99—*Construction—Absolute Conveyances alleged to be transfers of Mortgages—Whether evidence in proof of such allegation may be given—Dealings with a third person's property—Evidence of notice of third person's title.*

Respondents sued for possession under deeds purporting to be absolute conveyances. Appellants tendered evidence to show that to the respondents' knowledge the properties belonged to a third person who had motgaged them to appellants and that the deeds were intended to operate only as transfers of the mortgages.

Held:—that such evidence was admissible.

Section 92 of the Indian Evidence Act, which excludes evidence contradicting the terms of written instruments, in terms applies only "as between the parties to any such instrument or their representatives in interest." Whenever accordingly evidence is tendered as to a transaction with a third party, it is not governed by the Section or by the rule of evidence which it contains.

Held, also, that if S. 92 applied proviso 1 to that section would admit the evidence, because it would be a fraud to insist upon a claim to property arising out of such a transaction, the claimant knowing that the true owner had never parted with it.

* 26, 28 and 29 June, 1917.

1. (1916) 32 M. L. J. 259.

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In cases to which S. 92 is applicable, the English Equity doctrine as expsessed by Lord Justice Turner in *Lincoln* v. *Wright* [1] and followed in a long series of Indian cases was definitely excluded in India by the decision in *Balkishen Das* v. *Legge* [2]. The law is that oral evidence is not admissible for the purpose of ascertaining the intention of parties to written documents, and though attempts have been made to engraft an exception on this rule in favour of evidence relating to the acts and conduct of the parties, it is now settled that such evidence is inadmissible.

Achutaramaraju v. *Subbaraju* [3] *Maung Bin* v. *Ma Hlaing* [4] and *Dattu Valad Totarram* v *Chandra Totaram and another* [5] approved.

Appeal from a decree of the Chief Court of Lower Burma in its appellate jurisdiction, reversing a decree of Robinson, J.

The question in this case was whether any and if so what evidence was admissible to show that certain transactions which on the face of the documents effecting them purported to be sales were in fact mortgages only. A full account of the earlier proceedings will be found in 38 I. A. 146. The Privy Council in their judgment there reported referred the case to the Chief Court of Lower Burma for a new trial. Robinson, J. took evidence as directed by the Privy Council (which left open the question as to the admissibility of such evidence) and on such evidence found that the transactions were intended by the parties to be mortgages and that the plaintiffs were guilty of fraud in suing for possession on the basis of their being sales. He accordingly dismissed the suit. The Appellate Court (Hartnoll, C. J. and Ormond, J.) reversed this decision, on the ground that there had been no fraud on plaintiffs' part in procuring the documents and that oral evidence was not admissible to vary their terms. They gave plaintiffs a decree for possession.

Hence this appeal.

Sir Erle Richards, K. C. for Appellants, submitted that the evidence taken by Robinson, J. was admissible. The Board on the previous occasion had held that evidence would be admissible to show fraud, and also that the deeds in question could not affect the ownership of a third person not a party to the transaction.

[*Lord Sumner* :—It is one thing to say you can give evidence of fraud and quite another thing to say that when the parties know what they are doing and draw their deed in a particular form and take their chance of the law, then they can give evidence to explain away its terms. The Board surmised a case before].

1. (1859) 4 De G. and J. 16.
2. (1899) L. R. 27 I. A 58.
3. (1901) I. L. R. 25 M. 7=11 M. L. J. 370.
4. (1905) 3 L. B. R. 100.
5. (1905) I. L. R. 30 Bom. 119.

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I submit that if A and B having notice make an absolute conveyance of C's property that cannot affect C. I am arguing this on the assumption that I am Myaing. I have all his rights.

[*Lord Dunedin*:—Yes, this must be treated as a case between Myaing and Shew Pe. Does the Indian Evidence Act come in at all? Can you not rely on Kyin's admission to Myaing?]

I am here as Myaing and I cannot be affected by what two other people do behind my back.

[*Lord Dunedin* :—But it may be advanced against you that Myaing was an entire participator in the transaction by which Kyin's rights were transferred to Shwe Pe: that you have to rely on an oral agreement that the transaction should not take effect according to its terms and that S. 92 forbids this. Myaing was a third party, but a third party who *assented*].

S. 92 of the Indian Evidence Act deals with the parties to documents: the section which deals with persons who are not parties is S. 99. Being a third party I am covered by S. 99 and also by the previous judgment of the Board. The facts then were hypothetical but they have since been established by the concurrent findings. The Board laid down that if I could prove these facts S. 92 is not in my way. I have proved them. I stand altogether outside the Evidence Act. The plaintiffs here took with notice and the principle must be the same whether or not English rules apply; it is a principle of natural equity. *Ramcoomar Koondoo* v. *Macqueen* [1].

The Courts in India are not precluded by the Indian Evidence Act from exercising in such cases a jurisdiction similar to that of the Chancery Courts in England—vide Ameer Ali's Law of Evidence, notes to S. 92 of the Indian Evidence Act.

Secondly, I rely on provisoes (2) and (3) to S. 92. You can always have a deed that is only to come into effect under certain circumstances. An agreement that a sale shall be subject to redemption would be a separate oral agreement on a subject on which a document is silent.

[*Lord Shaw* : What would be left of S. 92?]

Thirdly, evidence of conduct of the parties is admissible notwithstanding S. 92.

1. (1872) L. R Ind. App. Supp. Volume 40, at p. 48.

Baksu Lakshman v. *Govinda Kanji* [1]. Specific Relief Act, (Act I of 1877) S. 26 (Illn. d.) *Hem Chunder Soor* v. *Kally Churn Das* [2], *Preonath Shaha* v. *Madhu Sudan Bhuiya* [3], *Rakken* v. *Alagappudayan* [4]. *Barton* v. *Bank of New South Wales* [5].

Dealing with the more recent decisions, in *Preonath Shaha* v. *Madu Sudan Bhuiya* [3], a Full Bench of the Calcutta High Court adopted previous decisions that such evidence was admissible. *Achutaramaraju* v. *Subbaraju* [6]. purported to follow *Balkishen's case*, [8] of which it took a wrong view. In *Sah Lal Chand* v. *Indarjit* [7], this Board held that a statement of fact in a document might be contradicted; an oral agreement as to consideration was then allowed to be proved. *Balkishen's case* [8], merely laid down that oral evidence of the intention of parties to deeds was inadmissible: it did not deal with evidence of their *subsequent conduct.* This was held by the Calcutta High Court in *Khankar Abdur Ranman* v. *Ali Hafez* [9] where a view of Balkishen's case was taken opposed to that expressed in *Achutaramaraju* v. *Subbaraju*,[6]. *Mahomed Ali Hossein* v. *Nazar Ali*[10] is in my favour. The judgment from which we appeal proceeded on the Burma Full Bench case of *Maung Bin* v. *Ma Hlaing*[11] which is no doubt against me.

[*Lord Dunedin* :—That case goes entirely on 25 Mad. 7 and 25 Mad. 7 goes on an erroneous reading of Balkishen's case.]

Hanifunnisa v. *Taigunnisa*[12] is, I submit, a clear decision under which I can prove what I want to prove: Lord Mac Naghten allowed the children there, the "purchasers", to prove that the deed of sale was really a gift.

There is a decision of the Bombay High Court in 1905, *Dattoo Valad Totaram* v. *Ram Chandra Totaram*[13], against me.

To sum up, I submit (1) that I am within the actual decision of this Board (2) that I can prove what I want to prove (3) that anyhow evidence of subsequent conduct is admissible, and ample for my purpose.

1. (1880) I L. R 4 B. 594, 597, 598
2. (1883) I. L. R 9 C. 528, 533.
3. (1898) I. L. R. 25 C. 603.
4. (1892) I.L. R. 16 M. 80, 82, 83.
5. (1890) A. C. 379.
6. (1901) I. L. R. 25 M. 7.
7. (1899) 27 I. A. 93.
8. (1899) L. R. 27 I. A. 58 65.
9. (1900) I. L R. 28. C. 256.
10. (1901) I. L. R. 28 C. 289.
11. (1905) 3 L. B. R. 100.
12. (1911) L. R. 38 I. A. 85.
13. (1905) I. L. R. 30 B. 119.

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De Gruyther, K. C. for the respondents, submitted that the decision appealed against was correct. A transfer of immovable property in India can only be by an instrument in writing and registered. Transfer of Property Act (Act IV of 1882) S. 54, 59. Indian Registration Act (Act III of 1877) S. 17 (b), 49. The burden of proving that a document is not what it purports to be is on those who allege it. Here it is contended that there was a contemporaneous oral agreement that what purported to be a sale should be a mortgage. The case turns on S. 92 of the Indian Evidence Act. Two views of this have been taken: (1) what I may call the Bombay, Madras and Burma view, that no evidence at all is admissible, and (2) the view that no *parol* evidence is admissible. I submit the first view is the correct one. The plain words of the Statute are in my favour.

If the principle adopted in *Lincoln* v. *Wright* [1], applied to India there would be an end of the matter: even parol evidence would be admissible. But this Board has held in *Balkishen's case* that you cannot rely on these English Chancery decisions: that you must go by the words of the Indian Evidence Act.

If this sort of evidence is admissible at all it is admissible, also against the mortgagor. Suppose the property goes down in value: the purchaser might say the transaction was a mortgage, and might prove high interest was agreed on. He might sue for a decree for sale, and get the property and some money to boot. All sorts of possibilities are opened up.

Balkishen Das v. *Legge* is reported in I. L. R. 19 A. 434, (Lower Court) and I. L. R. 22 A. 149 (Privy Council.) Originally there was a mortgage without possession. A fresh advance was made, and it was intended to convert the mortgage into one with possession. A deed of sale and a deed of covenant to resell were drawn up. Years after Legge sued for redemption. Balkishen alleged that the second deed was merely executed out of kindness. It was held by the Board that effect must be given to it.

The foundation of the argument against me is to be found in Melville J's judgment in *Baksu Lakshman* v. *Govinda Kanji*, [2].

That case is decided on the ground that the Bombay High Court had equitable jurisdiction.

1. 4 De G. and J. 16.
2. (1881) I. L R. 4 B 594, at pp. 593, 603, 603, and 605

Hem Chunder Soor v. *Kally Churn Das* [1], proceeds on the same footing.

[*Lord Dunedin*:—Of course you can set aside any deed on the ground that it was procured by fraud].

That is provided for by proviso (1) to S. 92. You can prove things which invalidate the document itself.

[*Mr. Ameer Ali*: You can't prove simultaneous oral agreement: but can the defendant give evidence of the subsequent conduct of the parties to show that the plaintiffs present contention ought to fail ?]

I rely on the following cases: *Achutaramaraju* v. *Subbaraju* [2]. *Dattoo Valad Totaram* v. *Ram Chundra Totaram* [3], *Mottayappan* v. *Palani Goundan* [4].

There is no third party here. Assuming the transaction is a mortgage, as soon as Kyin assigned to Pe, Kyin's mortgage is discharged and he goes out: by the assignment U Myaing becomes mortgagor and Pe Mortgagee, and appellant having acquired Myaing's equity of redemption claims to stand in his shoes.

Both Courts here have found that there was no *antecedent* fraud: that everybody entered into the transaction honestly. Robinson, J. has found subsequent fraud, but the Appellate Bench of the Chief Court have held that *Balkishen Das* v. *Legge* precludes proof of it.

I contend that no evidence of acts and conduct is admissible. Even if this be too wide, you have to distinguish between acts and conduct and parol evidence of such acts and conduct.

The first kind of "acts and conduct" relied on is the payment of interest. Robinson, J. does not find this.

[*Mr. Ameer Ali*: The *facts* are evidence.]

[*Sir John Edge*: Acts and conduct must be acts and conduct leading to the conclusion that this was a mortgage, not that its character has been changed.]

[*Lord Dunedin*: What you want to say is that though there are concurrent findings, those findings so far as based on parol testimony must go: and if they go, there is not sufficient substratum of real facts for any finding at all)].

1. (1883) I. L. R. 9 C. 528, 533.
2. (1901) I. L. R. 25 M. 7.
3. (1905) I. L. R. 30 B. 119.
4. (1913) I. L.R. 38 M. 226 230.

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'If you infer a mortgage from acts and conduct, you cannot fix its terms so as to give us a remedy ; we shall lose our money altogether.

(*Lord Sumner*: But that does not justify you in alleging your rights to be what they are not. "The way of the transgressor is hard."

[*Lord Shaw*: Your position is damaged by your own act.]

Sir Erle Richards replied: There are concurrent findings that Myaing and Kyin have all along remained in possession except as to small pieces of the property, and that the "price" was an under value. The question of sale at an undervalue was considered in *Balkishen's Case* [1].

[*Lord Dunedin*: The Rules of Equity are of universal application: but when you come to apply them in India, you are held up by S. 92 of the Evidence Act. That section however only applies as between parties. When third parties are concerned you can still rely upon Equity.)

I am entitled to show what I had and what they bought. I only had a particular interest.

Their Lordships' judgment was delivered (July 26, 1917) by

Lord Shaw

Lord Shaw:—This is an appeal originally brought by the defendants Maung Kyin, since deceased, and Maung Kyaw, from a judgment and decree of the Chief Court of Lower Burma in its Civil Appellate Jurisdiction, dated the 3rd August, 1914, reversing the judgment and decree of the Chief Court in its Civil Original Jurisdiction, dated the 17th June, 1912. The matters in suit between the parties have, on a former occasion, formed the subject of an appeal to this Board. The judgment upon that appeal was pronounced on the 11th July, 1911, and is reported in 38 Indian Appeals, p. 85. The meaning and effect of that judgment will be presently referred to.

The property which is the subject of the appeal consists of four different parcels of land situated in Kemmendine, a suburb of Rangoon. The facts of the case may be briefly stated thus: The owner of these plots of land was one Ko Shwe Myaing. On the 30th November, 1901, Myaing, having borrowed from Maung Kyin and Ma Ngwe Zan, his wife, 8,500 rupees, to bear interest at 1·8 per cent. per month, granted an out-and-out conveyance of two

1. (1899) L. R. 27 I. A. 58 at p. 68.

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these properties, which may be called (*a*) and (*b*), in favour of Kyin and his wife. No possession passed; interest was paid by Myaing and repayment of the loan to the extent of 3,500 rupees was also made. This left an unpaid balance of 5,000 rupees. On the 4th March, 1903, Kyin and his wife obtained payment of this sum from U Shwe Pe and his wife, and conveyed the properties (a) and (*b*) to the latter.

There were two other plots of land, which may be called (*c*) and (*d*). Kyin and his wife on the 13th February, 1902, having advanced 11,565 rupees, purchased these properties, which then also belonged to Myaing, by public auction. No possession passed. On the 4th March, 1903, Kyin and his wife transferred these properties to Shwe Pe and his wife in consideration of a payment of 11,000 rupees, 565 rupees having in the meantime been paid by Myaing. The state of matters accordingly was that, on the date last mentioned, namely the 4th March, 1903, U Shwe Pe and his wife became by *ex facie* absolute couveyances from Kyin and his wife vested in all the properties in suit.

Myaing was no party to these later transactions, but there is some correspondence showing that his part in the transaction was that he was desirous of having, and he obtained the benefit of, a reduction in the rate of interest from 1·8 per cent. per month to 1 per cent.

Then, on the 20th November, 1905, Myaing conveyed to the Kyins his equity of redemption. The footing upon which this deed was granted was manifestly that Myaing, notwithstanding the absolute conveyances, still considered himself as only having granted mortgages over his property, and having therefore an equity of redemption thereon, which he was free to dispose of.

U Shwe Pe having died, his widow and children brought this suit for possession of the lands, it being directed against Kyin and his wife. They resist possession being given, and maintain in substance that, although the conveyances to U Shwe Pe and his wife bear to be absolute in form, it was well known to them that the true nature of the transaction was one of mortgage upon the security of the properties. In particular, it is maintained that Shwe Pe and his wife knew that Kyin and his wife, who purported to grant the conveyance in absolute terms, were not in fact the owners of the property, but themselves only lenders thereon. This is an important consideration, as will afterwards appear, because

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it amounts to this: that the transfer, although *ex facie* of the deeds absolute in form, was in truth and to the knowledge of both parties a transfer *a non domino*. The dominus was Myaing, who was not a grantor. In short, the Kyins were purporting to sell and the Shwe Pes purporting to buy what both the nominal sellers and buyers knew to belong to somebody else.

When the matters in dispute were before this Board upon a former occasion, it was decided that evidence upon the topics above mentioned could be received, but no final judgment was given as to the effect to be given to such evidence after its reception.

The proof having been taken, their Lordships are now in possession of the facts and of concurrent findings upon the most important of these. It may be well to note how this stands. The learned Judge of the Chief Court (Original Civil Jurisdiction) puts the matter thus:—

"The evidence in my opinion taken as a whole, coupled with the conduct of the parties, shows that U Myaing and defendant meant their dealings resulting in Exhibits C and D to be mortgages. It is clear that U Myaing's object in the negotiations, which resulted in Exhibits A and B, was to transfer defendant's mortgage to his relative U Shwe Pe at a lower rate of interest, and U Shwe Pe's letters show he knew this and agreed to take over a mortgage. If he deliberately got deeds of sale executed, it was a gross fraud on U Myaing, and the evidence is admissible to show this. He now endeavours to profit by his fraud or has since determined to try and get the propeperty by taking advantage of the old Burmese custom of taking a sale deed where mortgage only was contemplated. He cannot profit by this fraud.

"I therefore hold that defendants were mortgagees only and that U Shwe Pe had notice of the fact."

Upon appeal in the Chief Court (Civil Appeal) the learned Judges held:

"If, however, evidence is admissible for the purpose of showing what was the real transaction; the facts (apart from the evidence which has been admitted under S. 33 of the Evidence Act) would clearly show that the parties concerned, viz: U Myaing, defendant Maung Kyin and U Shwe Pe, all intended that U Shwe Pe and his wife should take a transfer of the defendant's mortgages in the form of outright sales."

Upon the non-admissibility of the evidence reliance is placed by the respondents upon S. 92 of the Indian Evidence Act of 1872. It provides that when the terms of a contract, grant, or disposition are reduced to writing "no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from

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its terms." The first proviso is to the effect that "any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud . . . ., want of failure of consideration, or mistake in fact or law."

Founding upon this section, the respondents maintain that the whole of the evidence led must be rejected. On the contrary, the appellants maintain that, notwithstanding the terms of the section, they are entitled to set up and prove the acts and conduct of the parties as inconsistent with the transfer of property and only consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage. They found upon a considerable body of authority to that effect, the cases cited being *Baksu Lakshman* v. *Govinda Kanji and another* [1], *Hem Chunder Soor* v. *Kally Churn Das* [2], *Rakken and another* v. *Alagappuday-an* [3] *Preonath Shaha* v. *Madhu Sudan Bhuiya* [4] *Khankar Abdur Rahman* v. *Ali Hafez and others*, [5] *Mahomed Ali Hossein* v. *Nazr Ali and others* [6]. The judgment of Mr. Justice Melville in the first of these cases is repeatedly founded upon in the course of the series, in which that learned Judge expressly followed the English equity doctrine as expressed in *Lincoln* v. *Wright* [7] by Lord Justite Turner thus:—

"The principle of the Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between plainiff and Wright, the transaction should be a mortgage transaction, it is, in the eye of this Court, fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud."

In the opinion of their Lordships, this series of cases definitely ceased to be of binding authority after the judgment of this Board pronounced by Lord Davey in the case of *Balkishen Das and others* v. *Legge* [8]. It was there held that oral evidence was not admissible for the purpose of ascertaining the intention of parties to written documents. Lord Davey cites S. 92 of the Indian Evidence Act, and adds:—

"The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as

1. (1880) I. L. R. 4 B. 594.
2. (1883) I. L. R. 9 C. 528.
3. (1892) I. L. R. 16 M. 80.
4. (1898) I. L. R. 25 C. 603.
5. (1900) I. L. R. 28 C. 256.
6. (1901) I. L. R. 28 C. 289.
7. (1859) 4 De G. and J. 16=45 E. R. 6.
8. (1899) L. R. 27 I. A. p. 58.

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may be required to show in what manner the language of the document is related to existing facts."

Notwithstanding the decision of this Board, however, a certain conflict of authority on the subject still remains in India. But the respondents rightly refer to *Achutaramaraju and another* v. *Subbaraju* [1], *Maung Bin* v. *Ma Hlaing* [2], and *Dattoo Valad Totaram* v. *Chandra Totaram and another* [3], and in particular to the judgment of Chief Justice Jenkins in the last case. In these the judgment of the Board, as pronounced by Lord Davey, has been rightly followed and applied.

The principles of equity which are universal forbid a person to deal with an estate which he knows that he holds in security as if he held it in property. But, to apply the principles, you must be placed in possession of the facts, and facts must be proved according to the law of evidence prevailing in the particular jurisdiction. In England the laws of evidence, for the reasons set forth in *Lincoln* v. *Wright* and other cases, permit such facts to be established by a proof at large, the general view being that, unless this were done, the Statute of Frauds would be used as a protection or vehicle for frauds. But in India the matter of evidence is regulated by S. 92 of the Indian Evidence Act, and it accordingly remains to be asked, what is the evidence which under that statute may be competently adduced? The language of the section in terms applies and applies alone "as between the parties to any such instrument or their representatives in interest." Wherever accordingly evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such a case accordingly the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions.

Their Lordships view the case accordingly as having been dealt with on that footing by their predecessors at the Board. Thus, while in the course of the judgment of Lord Robson reference was made to evidence which might be taken "relating to the acts and conduct of the parties as distinguished from oral evidence and conversations constituting in themselves some agreement between them", nothing was decided upon that head, except that it would give rise to important and difficult questions

1. (1901) I. L. R. 25 M. 7.
2. (1905) 3 L. B. R. 100.
3. (1905) I. L. R. 30 B. 119.

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under the Indian Evidence Act. That question has now been settled by their Lordships, adversely to the reception of the evidence.

But the later passage of the judgment of Lord Robson is upon a topic much more crucial to the situtian which the facts proved in the case admittedly disclose:

"Their Lordships," said he, "however, are of opinion that the case for the appellants disclosed a charge of fraud against the respondents in relation to matters antecedent to those deeds, on which much of the evidence tendered would certainly be material. Thus it is said that the respondents, or the persons under whom they claim, took absolute conveyances of property from the appellants with notice that they in fact belonged to a third person, namely. the alleged mortgagor, Ko Shwe Myaing. If this be so, section 92 of the Indian Evidence Act, even if construed according to the respondents' contention, will not avail them. It is applicable to an instrument "as between the parties to any such instrument or their representatives in interest," but it does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance.

Upon the facts it now turns out quite plainly, and it was, indeed, admitted in argument that, when Shwe Pe took the conveyance from the Kyins, he knew that it was a conveyance of property which belonged to Myaing, and that accordingly the grant proceeded *a non domino*. If S. 92 applied, proviso 1 would seem to be in point, because it would be a fraud to insist upon a claim to property arising under such a transaction, the claimant knowing that the true owner had never parted with it. But, in the opinion of their Lordships, S. 92 does not apply, because the evidence, the admissibility of which is in question, is evidence going to show what were the rights of a third person, namely Myaing, in the property, and there are concurrent findings to the effect that the property was in that owner and not in the Kyins, who to the knowledge of Shwe Pe never purported to dispose of it as theirs. If a purchaser for onerous consideration and without notice had been the grantee under a deed of absolute conveyance, a totally different set of considerations would have arisen. In the present case, however, both grantor and grantee were dealing with the property of an owner who was a third person, who was not in the language of the statute either a party to the instrument or a representative in interest of a party to the instrument. The evidence led as to that third party's rights is admissible, and, if admissible, is most relevant. Their Lordships do not hold any doubt upon the subject of fact, in that respect entirely

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agreeing with all the Courts below. It is true that the Court of Appeal felt precluded by the terms of section 92 of the Evidence Act from agreeing with the Judge of the Chief Court, but in the opinion of the Board the section is, in the important particular last dealt with, no bar to the admission of the light on the true situation of the case.

Their Lordships will accordingly humbly advise His Majesty that the appeal be allowed, the decree of the Chief Court in its appellate jurisdiction, dated the 3rd August, 1914, set aside with costs, and the decree of the Chief Court in its original jurisdiction restored.

The respondents will pay the costs of the appeal.

Solicitors for Appellants :—*Arnould & Son.*

Solicitors for Respondents :—*Bramall & White.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS *Kt.* CHIEF JUSTICE AND MR. JUSTICE KUMARASWAMI SASTRI.

A. T. Venkata Narayana Pillai ... *Appellant* (Plaintiff).*

v.

V. Ponnusami Nadar and others ... *Respondents (Defendants 1 to 4 and 6 to 9.)*

Venkata Narayana Pillai v. Ponnusami Nadar.

Religious Endowments—Trustee—Suspension of—Power of Committee by circulation—Ordinary mode of a corporation transacting business—Suit for a declaration that suspension was wrongful—The existence of sufficient grounds for suspension, not a valid defence—Trustee wrongfully suspended by Committee—Right to damages against the members of the committee.

The ordinary way of bodies in the position of a corporation to transact business is at a meeting and assuming that it is open to them to transact some of their business in circulation they have no such power as regards matters such as suspension or dismissal of free-hold officers under their superintendence as to which their authority must be strictly pursued. *Rex* v. *Taylor* [1], *Rex* v. *Sutton* [2], *Thandavaraya Pillai* v. *Subbayyar* [3], *Ponnambala Pillai* v. *Muthu Chettiar* [4] followed.

Even if the question of suspension or dismissal could properly have been dealt with in circulation that could only have been by consent of all the members and any one of them would have had the right to insist on the question being dealt with at a meeting.

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*A. S. No. 430 of 1915. 12th September, 1917.

1. (1694) 3 Salk 231.
2. (1711) 10 Mod. 74
3. (1899) I. L. R. 23 M 488.
4. (1916) 30 M. L. J. 619.

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When a temple trustee had been given notice of some or all of the charges against him and one member of the temple committee drew up a report and forwaded copies of it to the other members of the temple committee proposing that the temple trustee should be suspended until further orders and the other members excepting one assented to the course, the action of the committee in suspending the trustee is *ultra vires* especially as one member objected to the legality of the step.

In a suit by the plaintiff trustee who was so suspended for a declaration that his suspension from the office was illegal and for damages it is not open to the court to enquire whether there were valid grounds for suspending the plaintiff and if so to dismiss the suit. It would not be a good answer to the suit to show that there were sufficient grounds for suspending the plaintiff.

A person in the enjoyment of a public office like that of a temple trustee is entitled to damages against corporators who were parties to his wrongful removal from office. *Vijayaraghava Chariar* v. *Secretary of State for India* [1] followed

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonum in O. S. No. 44 of 1912.

The Hon. The Advocate General (S. Srinivasa Aiyangar), S. Muthiah Mudaliar and *A. Krishnaswami Aiyar* for Appellant.

T. Narasimha Aiyangar for *T. Rangachariar* and *Gopalaswami Aiyangar* for Respondents.

The Court delivered the following

Judgment:—This is an appeal from a decree of the Subordinate Judge of Kumbakonum dismissing the suit brought by the plaintiff for a declaration that his suspension from the office of temple trustee by the Kumbakonum Devasthanam Committee was illegal, and for damages. The decision as to the legality of the suspension depends mainly in this case on the question whether the procedure adopted by the Committee can be supported. What happened was that, after the plaintiff had been given notice of some or all of the charges against him, the 2nd defendant a member of the Committee drew up a report Ex. B 1, and forwarded copies of it to the other members of the Temple Committee proposing that the plaintiff and some other trustees should be suspended until further orders. In it he stated that, though the subject had been or a long time before the meeting, it had not been concluded. " It is therefore sent in circulation. I request that instead of writing 'meeting' in this you will write your opinion." Defendants 1, 4 and 6 are proved to have assented to the course. The 5th defendant died after suit and defendants 7, 8 and 9 were not in office at the date of suspension. The 3rd defendant on receipt of Ex. B 1, sent an answer Ex. C. in which he stated, "It is not legal to take this

1. (1884) I. L. R. 7. M. 466.

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step by circulation, much less by taking individual opinions as you are now doing. The procedure adopted is wrong from beginning to end. I request you therefore to call a meeting for the purpose." Ignoring this request the 2nd defendant wrote to the plaintiff the letter Exhibit A 1, in which he stated that the plaintiff had been suspended for the reasons set forth in the accompanying proceedings order and asked him to hand over to another of the trustees. The proceedings Ex. A 1, recorded the opinion of the majority that the plaintiff should be suspended, and disclosed the fact that the matter had been dealt with in circulation. Now the Temple Committee is a statutory body to which the powers formerly exercised by the Board of Revenue under Regulation VII of 1817 have been transferred as regards certain temples by the Religious Endowments Act; and these powers it may now be taken as settled include a power of suspending or dismissing the Temple Trustees for sufficient cause. It has however been held that in exercising these powers they are to a large extent in the position of a corporation and that their actions must be tried by the same tests. Now it is well settled that the ordinary way for bodies in the position of a corporation to transact the business is at a meeting, and, assuming that it is open to them to transact some of their business in circulation, I think they have no such power as regards matters such as suspension, or dismissal of free-hold officers under their superintendence as to which their authority must be strictly pursued. *Rex* v. *Taylor* [1], *Rex* v. *Sutton* [2], *Thandavaraya Pillai* v. *Subbayyar* [3], *Ponnambala Pillai* v. *Muthu Chettiar* [4]. Even if the matter could properly have been dealt with in circulation, that could only have been by consent of all the members and anyone of them would have had the right to insist on the matter being dealt with at a meeting, as the 3rd defendant endeavoured to do in this case. See the observations of Page Wood, V. C., in *Hallows* v. *Ferine* [5]. which were approved by Sterling, J., *In re Great Northern Salt and Chemical Works: Ex parte Kennedy* [6]. Here there was not even what is ordinarily known as circulation, as the 2nd defendant merely sent copies of his proposals to each of the other members and obtained their individual assents to his proposals.

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1. (1694) 3 Salk 231=91 E.R. 795. 2. (1711) 10 Mod. 74=88 E. R. 632.
3 (1899) I. L. R. 23 M. 483, 485. 4 (1916) 30 M. L. J. 619.
5. (1867) L. R. 3 Eq., 520, 537. 6. (1889) 45 Ch. D. 472.

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In these circumstances we are clearly of opinion that the action of the Committee in suspending the plaintiff was *ultra vires*.

It is then said that we ought to enquire whether there were valid grounds for suspending the plaintiff and if so to dismiss the suit. Certain observations of Mr. Justice Shephard in *Seshadri Aiyangar* v. *Nataraja Aiyar* [1] were referred to, but these observations appear to have been *obiter* and no authority is cited. There are similar observations by Mr. Justice Sundara Aiyar in *Seshadri Aiyangar* v. *Ranga Bhattar* [2]. The case cited by him *The King* v. *Mayor etc. of London* [3] is no authority that this is a good answer to a suit, as in that case the Court merely refused to issue the discretionary writ of mandamus and observed that "no case has been cited to show that an assize will not lie for such an office as the present; or that he could not maintain an action for money had and received during his suspension. Further the office with which Mr. Justice Sundara Aiyar was dealing was that of archaka and other considerations may possibly apply to it. In *Willis* v. *Gipps* [4] the Privy Council recommended that an order of a motion made without due notice should be set aside although they at the same time reported that there were sufficient grounds for making this order. We are therefore of opinion that it would not be a good answer to the present suit to show that there were sufficient grounds for suspending the plaintiff. In this view it is unnecessary to consider the further objection that the plaintiff was removed without due notice, as we have held that the action was *ultra vires* on the other ground.

As regards the liability of the defendants or some of them for damages, there can be no doubt that the decision of a Bench of three Judges sitting on the Original Side in *Vijayaraghava* v. *Secretary of State for India in Council* [5] is authority for the proposition that a person in the enjoyment of a public office who is wrongfully removed is entitled to damages. In *Seshadri Aiyangar* v. *Nataraja Aiyar* [1] a trustee who was illegally suspended recovered Rs. 1,000 against the Temple Committee, Collins, C. J., being influenced by the fact that the Committee were actuated by an indirect motive, the fact that the plaintiff

1. (1898) I. L. R. 21 M. 179, 186, 187.
2. (1911) I. L. R. 35 M. 631.
3. (1787) 8 T. R. 209=(100 E. R. 66).
4. (1846) 5 Moore P. C. 379=13 E R. 536.
5. (1884) I. L. R. 7 M. 466.

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was a Vadagalai. In *Thandavaraya Pillai* v. *Subbayyar* [1] the plaintiff recovered damages before the District Munsif, and to this extent the decree seems to have been reversed by the District Judge, and the plaintiff did not appeal. As early as *Syed Amin Sahib* v. *Ibram Sahib* [2] it seems to have been assumed that damages might be recovered from a temple trustee for wrongful dismissal. On the other hand, there does not seem to be any instance of an action of this kind having been successfully maintained in England. In the case of *Darby* v. *Cozens* [3] already cited the suggested remedies of the removed officer were an assize or an action for money had and received to his use during the period of suspension, and not an action against the corporation for wrongfully suspending him, and in *Osgood* v. *Nelson* [4] it was thought well for the removed officer to proceed by action for money had and received against his successor. In *Harman* v. *Tappenden* [5] where a freeman of the Corporation was alleged to have been illegally removed from his office, it was helds that an action did not lie against individual Corporators for *act* erroneously done by them in their corporate capacity, at least not without proof of malice. This case was relied on by Kelly, C. B. in *Mill* v. *Hawker* [6] who held that for a tort committed by a corporation it could only be sued as a body. On the other hand Cleasby and Piggott, BB., held that members of a Highway Board who exceeded their authority by ordering a trespass to the plaintiff's land were individually liable. In *Mill* v. *Hawker* [7] Blackburn, J., the same case in the Exchequer Chamber, said that the question whether the corporators were liable was one of considerable importance and great difficulty. It would, he said, require time for consideration and probably the decision would not be unanimous. Accordingly he declined to decide it at that stage, and it has not been decided since. It has however long previously been ruled by the House of Lords in *Fergusson* v. *Kinnoull* [8] that where the law imposes a duty on any person or body of persons and they fail or neglect to perform that duty they are answerable in damages to those whom their failure or neglect injures. The appeal was from Scotland, but the judgments proceeded on grounds common to the laws of England and Scot-

1. (1899) I. L. R. 23 M. 483
2. (1868) 4 M. H. C. R. 112,
3. (1787) I. T. R. 552 555.
4. (1872) L. R. 5 H. L. 686.
5. (1801) 1 East 555.
6. (1874) L. R. 9 Ex. 309 at 321.
7. (1875) L. R. 10 Ex. 92,
8. (1842) 9 Cl. & F. 251.

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land, as was expressly stated, and thus contain general expressions which are rather in favour of extending liability of individual corporators at any rate to cases of excess of jurisdiction such as the present. It is also to be observed that it has been held by the Judicial Committee on appeal from India in *Calder* v. *Halket* [1], that even Judicial Acts at any rate of inferior courts are actionable in the absence of statutory provision if done wholly without jurisdiction. *Fergusson* v. *Kinnoull* [2] is also important because it lays down that it is only corporators who are parties to the failure or neglect of duty who can be held answerable in damages. It is also clear that S. 14 of the Religious Endowments Act contemplates that members of Temple Committees should be sued individually in cases under that section. On the whole it does not appear that the Madras cases are opposed to any settled rule of English Law or that there is sufficient reason for calling them in question.

As regards damages it is not shown that the plaintiff sustained any substantial damage by reason of the suspension though it was of course annoying to have the suspension tom-tommed in the neighbourhood. On the whole we assess the damages at Rs. 50 and reverse the decision of the Lower Court and give the plaintiff a declaration that his suspension was illegal and a decree against defendants 1, 2, 4 and 6 who must be considered as parties to the suspension, for Rs. 50 damages and for costs here and below calculated on that amount.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER AND MR. JUSTICE SRINIVASA AIYANGAR.

Sri Vikrama Deo Garu ... *Petitioner* in both (Plaintiff).*

v.

Sri Sri Sri Vikrama Deo Maharajulugaru. ... *Respondent in C. M. P. No. 1582 of 1916 (1st defendant)*

Sri Vikrama Deo Garu v. Sri Vikrama Deo Maharajulugaru.

Purdapashin Lady—Will—Execution—Nature of proof—Question of special incapacity not raised in the first Court when allowed on appeal—Hindu Law—Widow—Acquisitions out of income of properties granted for maintenance—Nature of estate.

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* C. M. P. Nos. 1582 and 1583 of 1916. 27th April, 1917.

1. (1839) 8 Moor. P. C. 28. 2. (1842) 9 Cl. & F. 251.

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The rule as to *Purdanashins* does not apply to all *Gosha* ladies alike. The rule at the best is one of presumption of want of ordinary capacity, which can be rebutted. Where it is found that a *Gosha* lady was, at the time of the execution of a will by her, about 55 years of age, was transacting business through agents to whom she gave personal instructions, interviewing Government Officers, giving evidence before Magistrates, directly presenting documents for registration, conducting heavy litigations through capable lawyers and giving them instructions, it is difficult to treat her as a *purdanashin*, though she as belonging to a noble family may be *Gosha* when young and may not needlessly appear in public even when she was advanced in years.

In a suit by a legatee to recover property bequeathed under the will of a Gosha lady, the only defences set up and the issues raised at the trial related to the genuineness of the will and its alleged revocation by the testatrix. There was no plea that the testatrix was a purdanashin lady who was unable to take care of herself and required special protection when she executed the will. The Court of first instance found the will to be genuine and subsisting and decreed a portion of the claim. The appellate court while holding that the will was genuine in the sense that the testatrix signed it, dismissed the suit on the ground that there was no direct proof that the will was read out and explained to, and was understood by the testatrix, who being the widow of an Uriya Zemindar must have been a purdanashin lady. *Held* that the appellate court should not have allowed such a plea to be raised for the first time in appeal, at any rate without giving an opportunity to the plaintiff to adduce evidence of the testatrix's capacity and status, the circumstances attending the execution of the will and the means she had of obtaining independent advice.

The ordinary presumption that a person in possession of property is the owner and absolute owner thereof applies to Hindu women also.

Where a Hindu widow purchases property out of the savings from the income of certain properties granted to her for life in lieu of maintenance, she has absolute powers of disposition inter vivos or by will over the property so purchased.

Petitions praying that in the circumstances stated therein the High Court will be pleased to direct the agent to the Governor in Ganjam to review his judgment in C. A. Nos. 50 and 49 of 1915 on the file of his Court, preferred from the decree of the Court of the Special Assistant Agent, Koraput Division in O. S. No. 20 of 1914.

V. Ramesam for the Petitioner.

B. N. Sarma and *R. Narasimham* for the Respondents.

The Court made the following

Order:—These are applications made under the Agency Rules for a direction to the agent to review his judgment by which varying the decree of the Special Assistant Agent, he dismissed the plaintiff's suit with costs. The suit was brought for the recovery of certain moveables and cash of nearly a lakh of rupees

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in value from the 1st defendant the Maharaja of Jeypore to whom they were handed over for safe custody by the Government the 3rd defendant, after the death of Sri Sulochana Patta Maha Devi whose property they were. The plaintiff claimed them as sole legatee under the will dated the 23rd November, 1901, of the Patta Mahadevi. The 1st defendant in answer to the plaintiff's claim raised two substantial pleas, one that the will which was executed by the Mahadevi at a time when she was bitterly hostile to him in consequence of a pending litigation between them was subsequently revoked by her after the suit was compromised in 1904 and (2) that the Mahadevi had no power of disposition over the suit properties as they were held by her as part of the Estate of Nowrangapore and Gudari which were settled on her for her maintenance for life in pursuance of the compromise aforesaid. Somewhat inconsistently with his plea of revocation of the will, which assumed that it was the genuine will of a capable testator, the 1st defendant also put the plaintiff to strict proof of the genuineness and validity and subsisting character of the will and proceeded to state that if any will was executed, the same must have been brought into existence by the plaintiff and his partisans fraudulently and collusively (para. 5 of the written statement). The 2nd defendant who also claimed the properties was removed from the suit in an early stage of the enquiry and the issues which were raised on his pleas were struck out. The Government took no part in the trial. A considerable number of issues were raised for trial between the plaintiff and 1st defendant of which only 2, 3 and 4 are now material; they relate to the title of the plaintiff. Of these the 2nd was "whether the will in question is genuine," the 3rd "whether the will was revoked," and the 4th "whether the Patta Mahadevi had absolute power of disposal." The trial Judge held on the 2nd and 3rd issues that the will was genuine and was not revoked and on the 4th that the Patta Mahadevi had only a Hindu widow's interest in the suit properties except in some clothes of small value included therein and gave a decree for the plaintiff for the clothes and dismissed the rest of his claim. Both the plaintiff and the 1st defendant appealed to the Agent who found in favour of the plaintiff on issues 3 and 4, and on issue 2 while holding that the will was genuine in the sense that the Patta Mahadevi signed it, however, found against the will on the ground that there was no direct poof that it was read and explained to her

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and was understood by her that being necessary in his opinion as he assumed that the Patta Mahadevi was the widow of an Uriya Zamindar and therefore must have been a Pardanashim lady and the 'plaintiff had a particular and peculiar onus to show that the executant thoroughly understood what she was doing and was thoroughly and fully acquainted with its terms"; a far higher burden than the ordinary burden of proving the will of a capable testator. The plaintiff contends that there was no plea that the Patta Mahadevi was a Pardanashin lady who required special protection when she executed the will, that the whole trial in the first court was really fought out on the question of revocation—the 1st defendant having practically given up his contention as to the genuineness of the will—that no such point was raised even in the grounds of appeal to the agent, that the plaintiff was taken by surprise by such a point being taken in the arguments on appeal and that if such a question had been raised in the original trial he would have offered evidence to show that the Patta Mahadevi was quite capable of taking care of herself. He also contends that the agent misdirected himself as to what was necessary to be proved before a lady can claim protection as a Pardanashim, and also that the Agent erred in holding that there must be direct proof that the will was read over and explained to the Rani. There is considerable force in these contentions.

It is to be observed that the form of the 2nd issue raised only the question of the genuineness of the will. In the 5th para of the written statement its validity was attacked apparently on the ground that the testatrix was not the absolute owner of the property as stated in para 4 and that was the subject of a separate issue, the fourth. The *subsisting* character of the will was questioned because it was said that it had been revoked and that again was the subject of the 3rd issue. There is no other paragraph of the written statement which in the remotest manner suggests that the Patta Mahadevi if she did execute the will did not understand it or know its contents and no notice was taken in either of the lower courts about the vague statements as to fraud and collusion. No issue was raised on it and apparently there is no evidence about it. On the other hand there was some attempt made to prove that the genuine will of the Rani was not the will propounded by the plaintiff, but that attempt wholly failed; for it was clearly proved, and that is the finding of both the lower Courts,

that the Rani deposited her will in a sealed cover in the Registrar's office and the identical cover with the seals in tact was produced by the plaintiff soon after the death of the Rani before Mr. Parsons the then Agent and was opened by him and contained the wlll now propounded by the plaintiff. This again is inconsistent with the plea that the Rani as a Pardanashin must be presumed till the contrary is proved to have had no knowledge of its contents. More than all it is quite clear, as pointed out by Mr. Ramesam that the defendant himself let in his evidence on the assumption that the Rani knew the contents of her will, for, witness after witness was called to prove that the Rani knowing that she had bequeathed to the plaintiff all her properties including Nowrangapur and Gudari for which she had obtained a decree against the 1st defendant in the first court, after the termination of that litigation by a compromise in 1904 called for the document from the Registrar's office where it was in deposit, and directed its destruction. We therefore think that the Agent should not have allowed this point to be raised in appeal at any rate without giving an opportunity to the plaintiff to adduce evidence of the Rani's capacity and status, the circumstances attending the execution of the will and the means she had of obtaining independent advice.

We also think that the Agent was wrong in thinking that the rule as to Pardanashins applies to all gosha ladies alike. The rule at the best is one of presumption of want of ordinary capacity, which can be rebutted. It has been pointed out that the Patta Mahadevi was at the time of the execution of the will about 55 or 56 years of age, was transacting her business through Agents to whom she gave personal instructions, was interviewing Government officers, was giving evidence before Magistrates and was directly presenting documents to Registration Officers. She had just then successfully emerged from a very heavy litigation in which she was represented by the late Mr. V. Krishnaswami Aiyar who was subsequently a Judge of this Court and afterwards a Member of the Executive Council. She came to Madras during the pendency of the appeal evidently to give instructions to her Vakils. It is difficult to treat a lady in her position and of her capacity as a Pardanashin, though she as belonging to a noble family may be gosha when young and may not needlessly appear in public even when she was advanced in years. Further the defendant's 12th witness Mohana Santra who was

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her Dewan or Principal Officer from 1900 to 1907, who is the principal witness for the defence to prove the revocation of the suit will state in his examination, that the wills (*i. e.*, the will and the previous will dated 10-10-1900 which she joined with her co-widow in executing) were written by the advice of Mr. Krishnaswami Aiyar and he knew about them. That statement if true is conclusive on this question, even if the Mahadevi was strictly a pardanashin. This witness attested both the wills, was present when it was deposited with the Registrar and it was he who brought it back from the Registrar's office in 1904 under a special power of attorney given by the Mahadevi.

It appears to be also true that the Agent precluded himself from considering a number of circumstances which go to show that the Mahadevi must have been fully conversant with the contents of the will by too narrowly confining his attention to direct proof. As we are not finally deciding the case it is unnecessary to enter into the details of the evidence here.

There were two issues the 7th and 6th which the agent thought it was unnecessary to decide; but they raised subsidiary questions of fact which were relevant in the decision of the 2nd and 3rd issues. Both sides complain that the agent should have considered those issues before arriving at a conclusion on the 2nd and 3rd issues. In these circumstances we must direct the agent to review his judgment on issues 2 and 3 in the light of the above observations. If he thinks it right to allow ths first defendant to raise the question as to whether the Patta Mahadevi was a pardanashin lady and whether or not she knew the contents of the will he must give the plaintiff an opportunity of adducing evidence as to her capacity and position as to her knowledge of the contents of the will.

The respondent attempted to support the judgment on the ground that the finding of the agent on the 4th issue as to the Rani's power of disposition over the suit properties was erroneous. He argues first that as there is no direct evidence as to how the suit properties were acquired, the plaintiff who has to make out that they were the absolute property of the testatrix, must fail as there is no presumption that they were her stridhan; next that the property was held by her as part of the estate settled on her by the deed of 1904 and must revert to the Maharajah on her death. As to the first it is difficult to see why the ordinary presumption that a person in possession is the owner and an absolute

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owner should not apply to Hindu women. See *Metters* v. *Brown* [1] and S. 110 Evidence Act. In *Narayana* v. *Krishna* [2], this Court held that property standing in the name of a Hindu lady with which she was dealing, was her separate property; and that there was no presumption that it was the common property of the family and in *Divan Ram Bijai Bahadur Singh* v. *Indar Pal Singh* [3] the Privy Council said that there was no presumption that property in the possession of a Hindu widow of the acquisition of which no account is given, descended to her from her husband though the husband was shown to have died possessed of considerable property, and that he who claims the property through some other person must show the property to have been *vested* in that person. In this case both the parties agree that the property was in the Rani's possession at the time of her death, and as the plaintiff claims under her he must succeed unless the 1st defendant proves his contention that her interest ceased on her death and the property reverted to him. This appears to have been the view taken in a very recent case in this court in *Bodi Muttayya* v. *Kavuri Kodandaramayya* [4], where the learned Judges held that if nothing is known as to how a Hindu female in possession acquired the property the presumption is that she is holding it as absolute owner though without title. The decision in *Gopal Iyengar* v. *Saviri Iyengar* [5] is not against this view.

Further it is to be observed that the 1st defendant is merely the custodian of the property pending adjudication of the rival claims of the plaintiff and the 1st defendant, and that the plaintiff who claims under the will of the last owner would preferably be entitled to possession. The fact that Government under executive authority chose to hand it over to the 1st defendant cannot give him a right to retain it unless he proves a title to hold them; for the representative of the person last in possession is entitled to have possession.

However that may be there is no difficulty in this case; for the nature of the property claimed and the circumstances of the case naturally lead to the conclusion that except as regards certain items of insignificant value, the rest of them are not likely to have come to the Rani by inheritance. Her husband Sri Chaitanya Deo died in 1876. She and her co-widow inherited from him the two valuable Taluqs of Nowrangapur and Gudari which had been

1. (1863) 32 L.J. Exch. 188. 2. (1884) I. L. R. 8 M. 214.
3. (1899) L. R. 26 I. A. 226=I. L. R. 26 C. 871.
4. (1914) 23 I. C. 594. 5. (1892) 2 M. L. J. 261.

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granted to his father who belonged to the junior branch of the Jeypore family by the then Maharajah. After Sri Sulochana Patta Mahadevi and her co-widow had been in possession and enjoyment for over 20 years, the present Maharajah, the 1st defendant, purported to resume the grant and entered into possession of the Taluqs and the two ladies sued the Maharajah for possession and mesne profits. While the suit was pending the co-widow died and Sulochana Patta Mahadevi continued the suit and obtained a decree. The Maharajah appealed to this Court and after the hearing began the parties compromised on the terms contained in Exhibit XLV-A the compromise decree passed by this court in pursuance of which the deed Exhibit 42 was executed. The construction of this deed is raised in the 2nd contention of the respondent but it may generally be stated now that the Rani was to have absolute or full enjoyment of the said taluqs during her life for her maintenance. This was in 1904. She therefore was not in possession between 1896 and 1904 of the bulk of the property inherited by her, got no mesne profits and was further engaged in a very heavy litigation. It is unlikely that she had any valuable moveables left at the end of that litigation. After that date she was in possession of the taluqs which gave her an income of about Rs. 100,000 and the bulk of the moveable property now sued for appears to be savings from the current income or purchased out of it. If the moveable property now sued for represents the savings out of the income which was at her absolute disposal it is quite settled so far as this court is concerned that she can dispose of it either inter vivos or by will. *Subramanian Chetti* v. *Arunachalam Chetti* [1], *Veeraraghava Reddi* v. *Kota Reddi* [2].

The respondent however contends that the Patta Mahadevi and the 1st defendant agreed that the savings out of the income from the taluqs which the Rani did not use or consume in her lifetime should belong to the Maharajah at her death and relies on the following passage in the deed, Exhibit 42 "the Maharajah without reserving to himself or his successors any power to revoke, vary or modify it, hereby grants to and settles on the Patta Mahadevi as from the 1st of July 1904 the Taluqs of Nowrangpur and Gudari with the cists in kind or money accruing due on, from, and after the said date to be held by the Patta Mahadevi for her maintenance during the remainder of her lifetime with full rights of enjoyment and to revert on her death to the Maharajah or to his

1. (1904) I. L. R. 28 M. 1. 2. (1916) 31 M. L. J. 465.

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successor for the time being to the Jeypore Samasthanam." It was said that the intention of the parties was to create an interest in the Rani, similar to a widow's estate not merely in the taluqs but also in the 'cists' or income of the taluqs. We think the words 'with the cists etc.' were used to denote that that every kind of interest in the taluqs were granted and not to cut down her absolute interest in the income, for she is given *full rights of enjoyment* of the taluqs. That this was the intention of the parties is clear from the first clause of the decree in pursuance of which the deed was executed, which is also recited in the deed. It is quite clear and it was not disputed that the Rani could have done anything she chose with the income, that she could have spent it or given it to any one she liked. The grant was really of a life estate in the taluqs in compromise of her claim to the absolute interest therein. That maintenance was stated to be the motive for the grant makes no difference in the quantum of the estate granted. Assuming that anything which she left undisposed of would go to the Maharajah, there is nothing in the deed to prevent the Rani from bequeathing the income or the savings or the properties acquired out of the income which was at her absolute disposal during her lifetime. It is also doubtful if any restriction on her power of alienation would be legally valid; see *Sureschandra* v. *Lalit Mohan* [1]. The finding of the agent on the 4th issue is therefore perfectly right. There is however one item, *i.e.*, arrears of rent, as to which there is no clear finding as to the amount due and payable to the Patta Mahadevi till her death. This must be found under the 11th issue. Issues 1 and 6 have been decided in favour of the plaintiff and there was no argument about them. Issue 5 is really a part of issue 4 and requires no further consideration. Issues 7 and 8 have to be considered in connection with issues 2 and 3. If the agent on a review of his judgment on issues 2 and 3 as directed by us decides them in favour of the plaintiff the agent must consider issue 9 if the plaintiff cannot have possession of the properties he is entitled to. He must also consider under the 10th issue what sum if any the 1st defendant is entitled to for the up-keep of the cattle. With these directions the case must go back to the Agent with a direction to him to revise his judgment and dispose of the appeal according to law. Costs here to abide and follow the result.

A. V. V.

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1. (1915) 22 C. L. J. 316.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE BAKEWELL.

Bodduluru Nagayya ... *Appellant** (*1st defendant*)

v.

Bachu Chenchuramayya and others ... *Respondents* (*Plaintiff, 2nd and 3rd Defendants*).

Bodduluru Nagayya v. Bachu Chenchuramayya.

Easements Act, S. 17—Surplus water flowing in defined channel—Right of easement in respect of—Acquisition—Presumption of grant of right to surplus water—Circumstances justifying—English Law and Indian Law—Comparison of.

A person can acquire a right of easement with respect to water which is discharged over the surplus weir of a tank if he has been using and enjoying the water for a sufficient length of time and as a matter of right as laid down in the Indian Easements Act.

Rayappan v. *Virabadran* [1], followed.

Where it appeared that the water of a tank fed by rain water as well as surface water from neighbouring lands flowed in a defined channel on to the respondents' land through the land of the appellant, who was not the owner of the tank, and that the respondent had been using and enjoying the said water for a sufficient length of time and as a matter of right as laid down in the Easements Act, *held* that he must be deemed to have acquired a right of easement with respect to the same notwithstanding the fact that the water was what might be called surplus water. *Held* further that in the circumstances of the case a grant of the said right might be presumed.

Appeal against the decree of the District Court of Nellore dated the 29th April 1916 in A. S. No. 234 of 1915 preferred against the decree of the Additional District Munsif of Nellore dated 28th July 1915 in O. S. No. 281 of 1914 (O. S. No. 538 of 1914, District Munsif's Court of Kavali).

T. V. Venkatarama Aiyar and *T. R. Vaidyanatha Aiyar* for Appellant.

K. Krishnaswami Aiyangar for Respondents.

The Court delivered the following

Judgment:—The appellant is the owner of a certain land through which the water of a tank belonging to another person flows in a defined channel on to the respondents' land. The case of the appellant is that since the water that is turned into this artificial channel is what overflows the surplus weir of the tank in question, therefore no right of easement can be acquired with respect to that water. It must be noted that the owner of the tank has not raised the question, but objection was raised only by

* C. M. A. No. 1 of 1917. 14th August, 1917.

1. (1884) I. L. R. 7 M. 530.

Bodduluru Nagayya v. Bachu-Chenchu-ramayya.

the owner of the intermediate land through which water flows before reaching the respondents' land. We think there can be no doubt that a person can acquire a right of easement with respect to water which is discharged over the surplus weir of a tank if he has been using and enjoying the water for a sufficient length of time and as a matter of right, as laid down in the Indian Easements Act.

The learned Vakil for the appellant relied very strongly on *Arkwright* v. *Gell* [1] and *Wood* v. *Wand* [2]. These cases enunciate the principle that if a person in using his own land pumps out the drainage water and throws it over another's land, the person on whose land the water is so thrown, cannot acquire an easement by prescription so as to enable him to say to the person from whose land the water is allowed to come by way of drainage that he must be prevented from so altering the user of his land as will stop such drainage water flowing to the lower land. But as pointed out by Lord Abinger in *Arkwright* v. *Gell* [1], the water in that case was pumped and discharged by the owner of the dominant land for his own convenience and for temporary purposes, and he also observes that the question would be different where the owners of intermediate land tried to intercept the flow of water so discharged. Reliance has also been placed on a ruling of the Privy Council in *Ramessur Pershad Narain Singh* v. *Koonj Behari Pattuk* [3], where their Lordships cited *Wood* v. *Waud* [2], with approval. The proposition laid down in *Ramessur Pershad Narain Singh* v. *Koonj Behari Pattuk* [3] is to the effect that the right to enjoyment of water of an artificial channel or tank can be acquired either by grant or by some arrangement of that nature, but that a grant may be presumed in a proper case. In fact in that case their Lordships found that there was a grant of the right to enjoyment of water discharged from a large artificial lake. Supposing this case applied, there should be no difficulty in presuming a grant in the present case.

S. 17 of the Easements Act, however, which is in force in this Presidency implies that a right of easement in connection with the use of water of artificial channels or of water derived from an artificial tank or pool can be acquired by prescription, and this question has been settled so far as this Presidency is concerned by

1. (1839) 5 M. and W. 203 also 151 E. R. 87.
2. (1849) 3 Exhe. 748 : 18 L. J. (Exch) 305.
3. (1878) I. L. R. 4 C. 633.

Bodduluru Nagayya v. Bachu Chenchuramayya.

the decision in *Rayappan* v. *Virabhadra* [1] which we have no hesitation in following. The law laid down in that case has not, so far as we are aware, been doubted hitherto. The whole gist of the learned vakil's argument is based upon the fact that the water that flows on to the respondents' land is what he called the surplus water of the tank. But there is a substantial difference between a case of this nature and the one that is dealt with in *Arkwright* v. *Gell* [2]. Here there is a tank which is fed by rain water as well as surface water from neighbouring lands, and the mere fact that the owner of the tank does not want more than a certain quantity of water and allows the rest to pass through the surplus weir, does not suggest that nobody else can acquire a right in connection with the water which is allowed to flow therefrom in a defined channel. We may further observe that the system of irrigation by means of connected tanks which so largely prevails in this country has been in existence from time immemorial and this is indisputable proof that the law in this presidency is not as suggested by the learned Vakil for appellant.

We therefore dismiss the appeal with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, *Kt.*, CHIEF JUSTICE AND MR. JUSTICE OLDFIELD.

Kanniammal *alias* Janakiammal minor by next friend G. Sundara Aiyar, late a minor but now declared major. Vide Order, dated 13-4-17 on C. M. P. No. 802 of 1917. ... *Appellant** (*Plaintiff*)

v.

Sanka Krishnamurthi ... *Respondent* (*Defendant*).

Kanniammal v. Sanka Krishnamurthi.

Specific Relief Act, S. 42—Proviso—Scope of—Suit for declaration that a mortgage decree is not binding on plff. and for an injunction restraining execution —Prayer for redemption, if essential.

A minor plaintiff brought a suit for a declaration that a mortgage decree passed against her as representative of her husband was not binding on her on the ground that she was sued and the decree obtained against her, as a major, and for an injunction restraining the defendant from executing the decree against her interest in the mortgaged property. The trial Judge dismissed the suit, holding that

* O. S. A. No. 35 of 1915. 26th April, 1917.

1. (1884) I.L.R. 7 M. 530. 2. (1839) 5 M & W 203.

the plaintiff was not entitled to the declaration prayed for, as she had omitted to sue also for redemption of the mortgage, that being a consequential relief which she was bound to ask for, under the proviso to S. 42 of the Specific Relief Act.

Held, reversing the judgment of the trial judge, that the suit as framed was maintainable and that the plaintiff was not bound to ask for redemption.

Per *Oldfield, J.*—The "further relief" contemplated by the proviso to S. 42 of the Specific Relief Act means further relief arising from the cause of action on which the plaintiff's suit for declaration is based.

On appeal from the judgment of the Honourable Mr. Justice Bakewell, dated the 15th day of February 1915 passed in exercise of the Ordinary Original Civil Jurisdiction of this court in C. S. No. 279 of 1914.

A. Ramachandra Aiyar for Appellant.

V. V. Srinivasa Aiyangar for Respondent.

The Court delivered the following

Wallis, C J

Judgment:—*Wallis, C. J.*:—This is an appeal from the judgment of Mr. Justice Bakewell, dismissing a suit brought by the minor plaintiff for a declaration that the mortgage decree passed against her father-in-law, brother-in-law, and herself, as representatives of her deceased husband, is not binding on her on the ground that she was sued and the decree obtained against her as a major. The plaintiff also asks for an injunction restraining the defendant from executing the decree against her interest in the mortgaged property. The learned Judge has dismissed the suit on the ground that the plaintiff is debarred from bringing this suit for a declaratory decree by the proviso to S. 42 of the Specific Relief Act, that "No court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so." The learned Judge observes that the plaintiff is now entitled to redeem the mortgaged property and holds therefore that she is not entitled to the declaration prayed for, as she has not sued for redemption. With great respect, we are unable to agree with this conclusion. There is on the records of the court a decree binding the interest of the plaintiff and if that decree is not binding upon her, we think that she is entitled to a declaration to that effect and to cancellation of so much of the decree.

With reference to the language of the proviso to S. 42 of the Specific Relief Act that no such suit is to be brought "where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so," we think that the meaning of the proviso is that as things stand at the time when the suit is brought the

Kanniammal v. Sanka Krishnamurthi.

Wallis, C. J.

plaintiff should be entitled to further relief, which she omits to claim, either because she does not want to pay the stamp duty or for any other reason, and that the proviso does not extend to cases where the plaintiff is not entitled to the further relief unless she does something further which she is not bound to do and which she may not be in a position to do, as, in this instance, to find the mortgage money. She has by the Limitation Act a very long time to find the mortgage money and in our opinion she cannot be required to do so at once on pain of losing her right to a declaration that a decree which is on the record of the court is not binding upon her, and for cancellation of so much of the decree on the records of the court as purports wrongly to bind her. We have not been referred to any authority which deals directly with this part of the case and we think it would be an undue extension of the proviso to hold that the plaintiff was to be debarred from bringing a suit for declaration on the ground that she is not in a position to find the mortgage money or consequently to ask for redemption.

The appeal must be allowed and the suit remanded. Costs will abide.

Oldfield, J.

Oldfield, J. :—The proviso to S. 42 of the Specific Relief Act is to the effect that no declaration should be made, "where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so". It seems to me that the further relief contemplated means further relief arising from the cause of action on which the plaintiff's suit for declaration is based. Here the cause of action was the existence of a decree alleged to have been illegitimately obtained, by which the plaintiff was required to redeem a mortgage within a specified time. The cause of action for a redemption suit will be independent of the existence of the decree. It will simply be the fact that the property has been mortgaged.

In these circumstances I do not think that the proviso is applicable to the present case. I agree with my Lord the Chief Justice.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Samandan Karakat Etathil Karnavan Ryrappan Nambiar.	*Appellant* * *(20th Defendant.)*
v.	
Manikot Velluva Veetil Raman Nambiar (deceased) and others.	*Respondents (Plaintiff 1st Defendant and Defendants 2, 3, 4, 5, 7, 8, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and L. R. of the deceased 1st Respondent.)*

Deed—Construction—" Panyam "—Mortgage or charge—Mortgage—Decree—Interest, rate of.

A document executed in Malabar and styled a " panyam " under which the borrower agrees to pay within one year the principal sum secured by the document with interest, creates a simple mortgage and is not a mere deed of charge.

Ordinarily a mortgagee is entitled to interest at the rate specified in the mortgage instrument till the date fixed in the decree for re-payment of the mortgage amount.

Ryrappan Nambiar *v.* Raman Nambiar.

Second appeal against the decree of the court of the Subordinate Judge of North Malabar in A. S. No. 418 of 1912 preferred against the decree of the Court of the District Munsif of Taliparamba in O. S. No. 535 of 1910.

D. Chamier and *K. Govinda Marar* for Appellant.

J. L. Rosario and *A. Sivarama Menon* for Respondents.

The Court delivered the following

Judgments:—*Sadasiva Aiyar, J.*—The 20th defendant is the appellant in this second appeal. The suit is brought upon a panyam deed of 1883 to recover, by sale of the property mentioned in the deed, the sum of Rs. 400 principal and the interest at 18 per cent. per annum from the date of the bond till date of repayment. The Lower Appellate Court decided against the contentions of the defendants and gave the plaintiff a mortgage decree for sale for the sum of Rs. 400 and interest thereon at 18 per cent. per annum till 5th January 1896 and for interest thereafter at 6 per cent. per annum. (Sadasiva Aiyar, J.)

In second appeal Mr. Chamier, the learned Counsel for the appellant, raised several contentions which might be shortly formulated thus: (1) Exhibit A is not a simple mortgage document but only created a charge and hence the plaintiff is not

* S. A. No. 1490 of 1914. 8th February, 1917.

Ryrappan Nambiar v. Raman Nambiar.

Sadasiva Aiyar, J.

entitled to take advantage of the provisions of Section 3 of the new Limitation Act of 1908 and his claim had become barred long before the filing of this suit; (2) The lower Appellate Court was wrong in its finding that the debt is binding upon the tarwad of the defendants 1 to 19 as, in arriving at this wrong decision, it has misconstrued Exhibit B; (3) The lower Appellate Court's decision that the plaintiff was not the benamidar of Kalliat tarwad is erroneous; (4) the plaint debt has been extinguished and the Lower Appellate Court's finding that it was not so extinguished is due to its misconstruction of Exhibit II; and (5) the Lower Appellate Court ought not to have allowed any interest after the expiry of the one year's period mentioned in Exhibit A for the repayment of the debt.

The last point is not taken in the memorandum of second appeal and there is nothing in it.

As regards the first point, namely, the question of limitation, the document is a panyam deed and the word 'panyam' when used in documents executed in Malabar means a mortgage if the property governed by the panyam deed is immoveable property. Further the provision in Exhibit A that "the sum of Rs. 400 with interest will be paid to the mortgagee within one year" clearly implies a personal covenant by the mortgagors to pay the amount and when there is such a personal covenant it has been held by a long course of decisions (of which I need only mention those in *Balasubramania Nadar* v *Sivaguru Asari* [1], *Ramabrahmam* v. *Venkatanarasu Pantulu* [2], *Rangappa* v. *Thammayappa* [3] and *Venkatarama Aiyar* v. *Suppa Nadan* [4]) the document of this character is a document of simple mortgage under the Transfer of Property Act.

[The rest of His Lordship's judgment except the last para, is not material to this report].

As regards the memorandum of objections, the Lower Appellate Court has given no legal reasons for allowing only 6 per cent. interest on the principal amount of the mortgage after 1896. The plaintiff is entitled to get interest at the original rate of 18 per cent. till the date fixed in the decree for repayment of the mortgage amount, interest and costs according to the usual provisions in a mortgage decree for sale. The memorandum of objections must therefore be allowed with costs. Time extended till the expiry of four months from this date for redemption.

1. (1909) 21 M. L. J. 562,
2. (1912) 23 M. L. J. 131,
3. (1914) 26 M. L. J 514,
4. (1914) M. W. N. 501.

Ryrappan Nambiar v. Raman Nambiar.

Spencer, J.

Spencer, J:—I entirely agree and I have only to add that as it has been argued that the Subordinate Judge was not justified in his findings of fact on the questions of (1) tarwad necessity, (2) the extinguishment of the plaint debt and (3) the benami nature of Exhibit A, it is to be regretted that when reversing the District Munsif's judgment on these points he did not entirely meet the reasoning given in the first court's judgment for the conclusions therein arrived at. At the same time the Subordinate Judge does give reasons of his own for the conclusions at which he arrives and his findings of fact cannot be upset in Second Appeal so long as there is some evidence to support them.

On the point of law it has been argued that there must be some transfer of interest in property to constitute a simple mortgage and that the suit document creates only a charge over the property for which the limitation period is 12 years, I am of opinion that it is too late now to ask us to hark back to the decision in *Rangasami v. Muthukumarappa* [1]. The decision in *Balasubramania Nadar* v. *Sivaguru Asari*, [2] *Ramabrahmam* v. *Venkatanarasu Pantulu* [3] and *Venkatarama Aiyar* v. *Suppa Nadan* [4], decided that a formal transfer of interest was an element of mortgage which need notbe expressed in the document of mortgage. In the last two decisions, the case in *Rangasami* v. *Muthu Kumarappa* [1] was considered and distinguished. Moreover *Rangasami* v. *Muthu Kumarappa* [1] dealt with a mortgage prior to the Transfer of Property Act. Here the Panyam deed in suit is one of 1883 subsequent to the Transfer of Property Act. I am not prepared to say that this document which describes itself as a panyam or mortgage created only a charge upon the property. The case in *Ramachariar* v. *Doraisami Pillai* [5] was one in which it was merely stated that the property in question was made a security for the debt. There are no such words in the document now in suit. I therefore consider that the second appeal must fail on all points and the memo. of objections must be allowed.

A. V. V.

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1. (1887) I. L. R. 10 M. 509.
2. (1909) 21 M. L. J. 562.
3. (1912) 23 M. L. J. 131.
4. (1914) M. W. N. 501.
5. (1913) 19 I. C. 605.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE OLDFIELD.

Sri Vidhya Varuthi Theertha Swamigal through his authorised agent. M. Ragavendra Row ... *Appellant** (*Legal representative of the counter petitioner*)

v.

Venkatarama Aiyar ... *Respondent* (*Petitioner*).

Ragavendra Row *v.* Venkatarama Aiyar

Limitation Act, S 14—Applicability—Execution of decree—Limitation—Execution application praying for transfer of decree—Dismissal because (a) of absence of proof that judgment-debtor had no property within jurisdiction of Court passing decree and (b) application barred by limitation—Subsequent application to same Court for attachment of properties within its jurisdiction—Limitation—Decree-holder if entitled to deduction of time of pendency of prior application.

On 13th September 1909 an application for execution was made to the District Munsif's Court of Tinnevelly (the Court which passed the decree) praying for a transfer of the decree from that Court to the Ambasamudram Munsif's Court. The application was dismissed on two grounds by the District Munsif—firstly that it was not shown that there was no property of the judgment debtor within the local limits of the Tinnevelly Court and secondly that the application was barred by limitation and the Munsif's order was ultimately restored by the High Court by an order dated 13th February 1913 On a fresh application made on 14th October 1913 to the Tinnevelly Court for attachment of the properties of the judgment debtor within its jurisdiction, *held* that the decree-holder was not, under S. 14 of the limitation Act, entitled to a deduction of the time between the filing of the previous application and of the date of the High Court's order thereon, in as much as (a) it could not be said that that application was proceeded with in a Court without jurisdiction, that is to say, that the said application was infructuous because it was proceeded with in a court without jurisdiction or on a similar ground within the meaning of S. 14 and (b) the relief sought by the subsequent application was not the same relief which was asked for in the application of 13th September 1909.

Appeal against the decree dated 31st July 1916 of the District Court of Tinnevelly in A. S. No. 316 of 1915 preferred against the order of the court of the District Munsif of Tinnevelly dated 24th March 1915 in E. P. No. 775 of 1913 in O. S. N. 75 of 1901.

T. Narasimha Aiyangar for Appellant.

K. R. Gurusami Aiyar and A. Subbarama Aiyar for Respondent.

The court delivered the following

Abdur Rahim, J.

Judgments :—*Abdur Rahim, J.*:—The question for decision in this appeal is one of limitation in connection with a petition for execution. The decree holder made an application for execution,

* C. M. S. A, No. 143 of 1916. 19th September, 1917.

Ragavendra Row v. Venkatarama Aiyar. Abdur Rahim, J.

No. 1571 of 1909 on the 13th September 1909, the object of the application being to get a transfer of the decree from the Tinnevelly court to the Ambasamudram Munsif's court. The application was dismissed on two grounds by the District Munsif—firstly that it was not shown that there was no property of the judgment debtor within the local limits of the Tinnevelly court and secondly that the application was barred by limitation. Then on appeal, the Subordinate Judge reversed that order. But the High Court in second appeal restored the order of the District Munsif. This was on the 13th February 1913. The present application was put in on the 14th October 1913 and limitation is said to be saved by deducting the time between the filing of the application on the 13th September 1909 and of the date of the High Court's order, 13th February 1913. The District Judge who has held in favour of the decree-holder applied Section 14 of the Limitation Act to this case. But it seems to us that that section has no application because it could not be said that the application was proceeded with in a court without jurisdiction, that is to say, that the application was infructuous because it was proceeded with in a Court without jurisdiction or on a similar ground. The Tinnevelly Court had jurisdiction to deal with the application for transfer though it could make the order only if certain facts were proved. It could not be said therefore that the decree holder was pursuing his remedy through a *bona fide* mistake in the wrong court. Further the relief that is now sought, that is, attachment of properties in the Tinnevelly Court is not the same relief which was asked for in the application of the 13th September 1909 because all that was asked for in it was transfer of the decree for execution to another court.

Then the learned Vakil for the respondent has asked us to uphold the order of the District Judge on the basis of the ruling reported in *Nrityamoni Dasi* v. *Lakhan Chandra Sen* [1] following a ruling in *Lakhan Chunder Sen* v. *Madhusudan Sen* [2]. There, what was apparently held was that since the party against whom limitation was pleaded was in fact litigating the same question in another court, the remedy of the party was suspended during the time, that that litigation occupied. This apparently was the principle, so far as I understand it, upon which that case proceeded. I am unable to hold that it applies to the present proceedings.

1. (1916) I. L. R. 43 C. 660. 2. (1907) I. L. R 35 C. 209.

Ragavendra Row v. Venkatarama Aiyar.

Abdur Rahim, J.

The one complete answer to the argument of the learned Vakil for the respondent is that the remedy which is now sought could have been asked for if he had only put forward proper facts before the court even while the application of the 13th September 1909 was pending litigation. It was open to him to find out the facts and make an effective application for attachment of the properties. The appeal must be allowed and the execution petition of 14th October 1913 is dismissed with costs here and in the court below.

Oldfield, J.

Oldfield, J. :—I agree and only wish to add that I cannot read the decision in *Nrityamani Dasi* v. *Lakhan Chandra Sen*[1] as in any way affecting the scope of S. 14 of the Limitation Act; and applying S. 14 of the Limitation Act, there is no doubt that the appellant must succeed.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER AND MR. JUSTICE KRISHNAN.

Manickam Pillai ... *Appellant * (1st Defendant).*

v.

Ratnasami Nadar and others ... *Respondents (Plff. and Defts. 2 to 4.)*

Manickam Pillai v. Ratnasami Nadar.

Trust—Lease by managing trustee of a temple, when binding on the institution—Unregistered lease for a term of years—Lessee in possession paying monthly rent—Presumption of monthly tenancy—Right of new lessee from lessor to give notice to quit to monthly tenant on the land—Transfer of Property Act, Ss. 106 and 109—English and Indian Law.

Where in accordance with the usual practice of a temple, the managing trustee leases out temple properties taking the muchilika in the name of both the trustees and the other trustee does not object to the arrangement, the lease is binding on the temple.

Where a tenant who originally came into possession of the demised land under an unregistered and therefore, invalid lease for 10 years, continued in possession with the consent of the lessor paying rent at a monthly rate, the presumption is that a monthly tenancy was created between the parties by oral agreement accompanied by possession.

Where there was an outstanding monthly tenancy at the time of the grant of a term lease for 20 years in favour of the plaintiff, it is competent to the plaintiff to give a valid notice to quit to the monthly tenant of the premises and to eject the latter on the expiry of the period prescribed by such notice. The provisions of the Transfer of Property Act are not inconsistent with the English Law on this subject.

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* S. A. No. 307 of 1917. 21st September 1917.

1. (1907) I. L. R. 35 C. 209.

Manickam Pillai v. Ratnasami Nadar.

Second appeal against the decree of the District Court of Tanjore in A. S. No. 142 of 1916, preferred against the decree of the court of the District Munsif of Negapatam in O. S. No. 396 of 1914.

G. S. Ramachandra Aiyar for Appellant.

C. V. Ananthakrishna Aiyar for Respondents.

The Court delivered the following

Judgment:—Two points have been raised before us by the appellant in this case: (1) that Exhibit A, the muchilika given by the plaintiff is not valid as it was agreed to only by one of the trustees of the plaint temple and not by the other; (2) that the defendant has a monthly tenancy apart from the lease, Exhibit II and that it has not been properly terminated as the notice to quit given to him was not by his lessors or on their behalf but by the plaintiff himself and in his own name.

On the first point, we agree with the District Judge that the muchilika Exhibit A is valid and binding on the temple as it was taken in accordance with the usual practice of the temple by the managing trustee in the name of both the trustees. Though the ordinary rule is that when there are more trustees than one all must join in the execution of the trust and that one trustee cannot delegate any of his duties to his co-trustee, yet the delegation in the regular course of business is not improper. Compare Ss. 47 and 48 of the Indian Trusts Act which state the principles, though they do not apply to the present case. As it is shown that in the ordinary course of business, the leases of the plaint temple properties were arranged by the managing trustee on behalf of both the trustees, the muchilika Exhibit A executed in accordance with that practice, the other trustee not objecting, must be valid.

On the second point we are unable to agree with the District Judge that the defendant's position was, that of a tenant at will liable to be ejected without notice. His new lease Exhibit II is no doubt invalid and therefore it did not alter or affect his previously existing rights, if any, in the property. It is shown that the defendant has been in occupation of the plaint property for some years before suit paying rent to the trustees at monthly rate, though payment was made for convenience in a lump sum apparently once a year. He came in originally under a lease for ten years but as the lease deed was not registered it was of no

Manickam Pillai v. Ratnasami Nadar.

effect in creating a term lease in his favour, S. 107 of the Transfer of Property Act requiring a registered instrument for the purpose. But as he continued in possession with the consent of the trustees paying rent at a monthly rate we must presume that a monthly tenancy was created between the parties by oral agreement accompanied by possession. Under S. 106 of the Transfer of Property Act, the presumption is, in the absence of a contract or local usage to the contrary, that the lease is from month to month, as this lease was not for agricultural or manufacturing purposes. Defendant being thus a tenant from month to month, a proper notice to quit was certainly required to terminate his tenancy before he could be ejected. The notice given in the present case though admitted to be otherwise proper, is argued to be invalid as it was not given by the lessors or on their behalf. The notice here was given by the plaintiff in his own name. No Indian authorities have however been cited to us on the point. The English law as pointed out by the Respondent's vakil is that the person legally entitled to the immediate reversion of and in the demised premises is the proper person to give the notice to quit. See Foa on Landlord and Tenant, 4th Edition, page 163 and Woodfall on Landlord and Tenant, 19th Edition, page 408. Where the landlord had given a 14 years' lease of his premises in the possession of a yearly tenant, to a new lessee, it was held that the new lessee was the proper person to give the notice to quit and the notice given on the landlord's behalf was held to be bad in law. See *Wordsley Brewery and Co.* v. *Halford* [1]. We must adopt this rule unless the Indian Law under the Transfer of Property Act is clearly different. Although the matter is not free from difficulty we are inclined to think that the provisions of that Act are not inconsistent with the English rule. It is true that S. 106 of that Act contemplates that the notice is to be given by the lessor or by an authorised agent on his behalf. That no doubt is the primary rule. But S. 109 enacts that the transferee of any part of a lessor's interest in the property is entitled to all the rights of the lessor as to the property or part transferred. The words "transferee of any part of his (the lessor's) interest" therein (*i. e.* in the property) are wide enough to include a term lessee like the plaintiff with a lease for 20 years. No doubt S. 105 in defining

1 (1903) 90 L. T. 89.

Manickam Pillai v. Ratnasami Nadar.

a lease does not use the words "interest in property" as in S. 58 in defining a mortgage. Nevertheless a "right to enjoy the property" which are the words used in S. 105 is an interest in the property. In English Law it is treated as an assignment of the reversion when the property is already in a lessee's possession. It was also argued that the rights referred to in S. 109 are the rights mentioned in S. 108 and no more. But the words used are "all the rights" and the expression is very comprehensive. There does not seem to be any reason why the words should be held not to include the right to recover possession by terminating the tenancy of a previous lessee by giving the necessary notice to quit. That is one of the rights of the lessor "as to the property" transferred. *Prima facie* a person entitled to possession should have the right to reduce the property into possession. To hold in favour of the appellant's argument will lead to the anomaly of having to hold that a transferee of the property leased could not give notice and terminate the lease though under S. 109 he becomes entitled to be paid the rent due from the date of his transfer by the lessee. The right of attornment necessarily carries the right to eject with it, if the tenant is liable to be ejected.

We must therefore hold, in agreement with the District Judge, that the notice to quit given by the plaintiff was a proper notice.

The Second Appeal fails and must be dismissed with costs.

A. V. V.

PRIVY COUNCIL.

PRESENT:—LORD DUNEDIN, LORD SHAW, LORD SUMNER SIR JOHN EDGE AND MR. AMEER ALI.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

P. C.

Girdhari Singh v. Megh Lal Pandey.

Rajkumar Thakur Girdhari Singh ... *Plaintiff * Appellant.*

v.

Megh Lal Pandey and Others ... *Defendants-Respondents.*

Land Law in Bengal—Zemindar—Mokuraridar—Permanent Tenure—Minerals—Rights to Minerals—Mokurari pottah—Effect of pottah with all rights (mai huk hakuk).

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* 19th July, 1917.

P. C.

Girdhari Singh v. Megh Lal Pandey.

When a grant or lease is made by a Zemindar of a tenure at a fixed rent, although the tenure may be permanent, heritable, and transferable, minerals will not be held to be included in the absence of express evidence to that effect.

General expressions in such a Pottah (*e. g.*, "with all rights", "with all right, title, and interest") do not increase the actual corpus of the subject affected by the Pottah. They only give expressly what might otherwise quite well be implied *viz*, that the corpus being once ascertained, there will be carried with it all rights appurtenant thereto.

The essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. To permit of the idea of partial consumption of the subject leased, minerals must be expressly denominated.

Where the proprietor of a zemindari executed a permanent heritable and transferable mokurari pottah at a fixed rent of a small portion of a village within its ambit "with all rights (mai huk hakuk)—appertaining to my zemindari", *Held* that the mineral rights were not included in the pottah, which gave the mokuraridar only surface rights; and that in the absence of an express grant the mineral rights remained in the zemindar.

Megh Lal Pandey v. *Rajkumar Thakur* [1] reversed.

Kumar Hari Narayan Singh Deo Bahadur v. *Sriram Chakravarti* [2], *Durga Prasad Singh* v. *Braja Nath Bose* [3] and *Sashi Bhushan Misra* v. *Jyoti Prasad Singh Deo* [4] followed.

Appeal from a judgment (reported in 34 Cal. 358) and decree of the High Court at Calcutta, dated December 19, 1906, reversing a judgment and decree of the Court of the Subordinate Judge of Manbhum, dated June 19, 1905.

The question for determination was whether the respondents had acquired as against the appellant zamindar, rights to minerals under their mokurari pottah, dated the 27th Assar 1272 (10th July 1865). The Subordinate Judge held that the minerals did not pass under the pottah, but the High Court reversed that decision and held that such rights passed to the mokuraridar. The pottah was as follows :—

"I settle in mokurari the whole of the mouzah Baramashya, with all rights as per boundaries given below, appertaining to my zamindary, the third kismat, pergunnah Nawagarh, which is in my possession, together with bil, jhil, orchards, tanks, cultivated lands, with dangas bhita (homestead) and jhari (jungle) standing on the same, with the exception of the rakh (preserved) jungle lying to the south of the road of Jugia Bhita, and extending up to the Coruru Dobajore, which I keep in my Khas possession, at an annual jumma of Rs. 59 and 2 seers of ghee and one goat and by accepting Rs. 59, as the bonus proportionate to the

1. (1906) I. L. R. 34 Cal 356.
2. (1910) L. R. 37 I. A. 136.
3. (1911) L. R. 39 I. A. 133;
4. (1916) L. R. 44 I. A. 46.

P. C.
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fixed rent of Rs. 59. You shall enjoy and hold possession of the aforesaid village with your sons and grandsons at your full bliss on payment of the said amount of rent to me every year according to the following instalments. If you do not pay the rent according to the instalments every year, the mokurari will be cancelled at the end of the year. You shall not get abatement of rent on the plea of inundation, drought and the land remaining waste. You shall be entitled to the extra collections which will be realized in the village and you shall take the prices of the trees of the same by cutting and selling them to which I shall not have any right. There will never be any increase in this rent. If I or my heirs raise any objection, the same will be disallowed. To this effect I execute this mokurari pottah on receiving Rs. 59 in cash."

De Gruyther, K. C. and *Dunne*, for the Appellant:—A Mokurari pottah is not tantamount to a conveyance in fee simple: *Abhiram Goswami* v. *Shyama Charan Nandi* [1], which reversed the decision in *Shyam Charan Nandi* v. *Abhiram Goswami* [2], relied on by the High Court. The zemindar is the owner in fee and the effect of the recent decisions of the Board is that the title to the minerals is in the zamindar and not in the mokuraridar unless it is expressly shown that the zemindar has parted with it. *Kumar Hari Narayan Singh Deo Bahadur* v. *Sriram Chakravarti* [3], *Durga Prasad Singh* v. *Broja Nath Bose* [4] and *Sashi Bhuhan Misra* v. *Jyoti Prashad Singh Deo* [5].

The High Court has also relied upon *Sriram Chakarvarti* v. *Hari Narain Singh Deo* [6], but that case was reversed by this Board by the decision in *Kumar Hari Narayan Singh Deo Bahadur* v. *Sriram Chakravarti* [3]. The expression "mai-huk hakuk", meaning "with all rights", includes as the Subordinate Judge has held, all surface rights. The English Law of Conveyancing is not applicable in this case.

Sir Erle Richards, K. C. and *Sir W. Garth* for the Respondents:—There is a grant here which according to English law gives the Mokuraridar the minerals. The words of the grant pass the minerals. The cases cited by the other side can be distinguished. There was no grant in evidence in any of those cases. The Board there simply decided that they could not be asked to

1. (1909) L. R. 36 I. A. 146 : 19 M. L. J. 530. 2. (1906) I. L. R. 33 C. 511.
3. (1910) L. R. 37 I. A. 136=37 C. 723=20 M. L. J. 569.
4. (1912) L. R. 39 I. A. 133=23 M. L. J. 26. 5. (1915) L. R. 44 I. A. 46.
6. (1905) I. L. R. 33 C. 54.

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say that the minerals passed to the mokuraridars in the absence of any evidence of a grant. But here there is a grant which gives all rights, and the right to the minerals is included in them. There being no grant in evidence in those cases it was not necessary to decide there whether, when there is a grant in evidence, the terms of the grant must expressly give the rights to minerals. General words in the grant may include rights to minerals. The object of the grant was to pass all rights. The mokuraridars has the power to cut and sell trees. An ordinary lessee would not have such power. The grantee here intended to pass all his rights including the rights to minerals.

No reply was called upon.

The judgment of their Lordships was delivered (July 19, 1917) by

Lord Shaw.

Lord Shaw :—The appellant is the proprietor of the zemindari of Pergunnah Noagarah, being Mahal No. 16 of the touzi of the Collectorate of District Manbhoom.

In 1865 he executed a *mokarari Pottah* of a small portion of Mouzah Baramashya "with all rights" (this being the translation of the expression "*mai hak hakuk*") "as per boundaries......appertaining to my zemindari, the third kismat Pergunnah Nawargarh, which is in my possession." An annual jumma was fixed of 59 rupees and 2 seers of ghee and 1 goat.

It is admitted that the possession was of a permanent and heritable character, subject to the payment of rent, failing which latter the *mokarari* " will be cancelled at the end of the year." There is also a clause as to trees in these terms :—

"You shall be entitled to the extra collections which will be realised in the village. and you shall take the prices of the trees of the same by cutting and selling them, to which I shall not have any right."

In 1903, minerals having been discovered below the surface of the land which was the subject of the *mokarari Pottah*, the respondents began to work them, claiming that they had a right to do so in respect that the minerals were within the subjects of their *mokarari* lease. This claim was resisted by the appellant, who brought the present suit for injunction and damages. The appellant is the zamindar.

On the one hand, it is admitted that minerals were not expressly included within the terms of the *Pottah*. On the other, that the terms were general, as above quoted, and that there was

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no exclusion of these minerals. The Subordinate Judge held that the *mokarari* lease did not pass the underground and mineral rights. The learned Judges of the High Court of Calcutta, on the 19th December, 1906, held that it did. They accordingly set aside the decree and judgment of the Lower Court and dismissed the suit.

In their Lordships' opinion, the judgment and decree of the High Court are erroneous, and those of the Subordinate Judge fall to be restored. It is unnecessary to enter into the general question of law, as, in their Lordships' opinion, that has been conclusively and recently settled by this Board. It is unavailing to urge that the right granted by the *mokarari Pottah* to the lessee is of a permanent, heritable, and transferable character, as even although this be the case it does not advance the question of whether the lease itself embraced within its scope the mineral rights. On the contrary, unless there be by the terms of the lease an express or plainly implied grant of those rights, they remain reserved to the zamindar and part of the zamindari.

Their Lordships refer to the judgment of the Board in *Kumar Hari Narayan Singh Deo Bahadur and another* v. *Sriram Chakravarthi and others* [1]. In the case as reported in I. L. R. 33 Cal., p. 54, a clear finding had been made which may be cited from the judgment of Pargiter, J.:—

"There is no basis for holding that the underground rights have not passed as part of the tenure. To hold otherwise would be to hold that a tenant in perpetuity can never work mines, because they do not belong to his tenure; and that the landlord can never work them, because he has no reversion and no right to enter on the land for that purpose...... In my opinion, the underground rights belong to permanent tenures."

This judgment was reversed by this Board, and it was held that the zemindar "must be presumed to be the owner of the underground rights thereto [that is, appertaining to the zamindari], in the absence of evidence that he ever parted with them." Their Lordships think it right to refer to this case because, in the judgment of the High Court, the Calcutta decision is referred to as if still law, this not being the case.

Hari Narayan Singh's case was followed by that of *Durga Prasad Singh* v. *Braja Nath Bose* [2]. This had reference to a claim for minerals underlying two mouzahs of a zamindari. The zamindar claimed them and the defendant also did so, he being in

1. (1910) 37 I. A. 136=37 C 723=20 M. L. J 566.
2. (1912) 39 I. A. 133=39 C. 696.

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possession under a *digwari* tenure. This tenure is hereditary and inalienable, subject to the *digwar's* liability to be dismissed by the Government for misconduct. The judgment of the Board was pronounced by Lord Macnaghten to the effect "that it must be presumed that the mineral rights remain in the zamindar in the absence of proof that he had parted with them."

Finally, in *Sashi Bhushan Misra* v. *Jyoti Prashad Singh Deo* 1, and after a review of the decisions, it was held that the grant by a zamindar of a tenure at a fixed rent does not carry a right to the minerals. In the language of Lord Buckmaster:—

"These decisions, therefore, have laid down a principle which applies to and concludes the present dispute. They establish that when a grant is made by a zamindar of a tenure at a fixed rent, although the tenure may be permanent, heritable, and transferable, minerals will not be held to have formed part of the grant in absence of express evidence to that effect."

On the general question, accordingly, one need not proceed further to consider the suggestion that the lessee in a *mokarari Pottah.* has right to the minerals by reason of the nature of such a grant. Such a suggestion stands negatived upon authority.

There are two points, however, which remain as applicable to the present case. It is said that minerals must be included because of the use of the expression *mai hak hakuk* in this *Pottah.* On the assumption that the expression means "with all rights" or may be properly amplified as "with all right, title, and interest," such expressions, in their Lordships' opinion, do not increase the actual corpus of the subject affected by the *Pottah.* They only give expressly what might otherwise quite well be implied, namely, that that corpus being once ascertained, there will be carried with it all rights appurtenant thereto, including not only possession of the subject itself, but it may be of rights of passage, water or the like, which enure to the subject of the *Pottah* and may even be derivable from outside properties. It must be borne in mind also that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. In order to cause the latter specially to arise, minerals must be expressly denominated, so as thus to permit of the idea of partial consumption of the subject leased. Their Lordships accordingly are of opinion that the words founded on do not add to the true

1. (1917) 44 Ind. App. 46=32 M. L. J. 245.

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scope of the grant nor cause mineral rights to be included within it.

A second point mentioned as a specialty in the present case is the reference in the *Pottah* to the trees. The lessee is given power to cut and, if he cares, to sell these; and the zemindar renounces any right in them and their proceeds. Had the *mokarari Pottah*, however, been a document which by its nature gave as in property the entirety of the land both on and below the surface, such a provision with regard to the trees would be entire surplusage. The point is not of great importance, but it negatives the idea that the *mokarari Pottah* can be so comprehensively viewed. Such a lease is a lease of the surface only. This is the general case to which in the present case there is alone superadded a right to the trees. The minerals are not included.

Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs here and below and the decree of the Subordinate Judge restored.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondent: *T.C. Sommerhays & Son.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE AYLING AND MR. JUSTICE KUMARASWAMI SASTRI.

Palakkunnath Illath Govindan Nambudri ... *Plaintiff**

v.

Ottathayil Moideen ... ... *Defendant.*

F. B

Govindan Nambudri v. Ottathayil Moideen.

Stamp Act—lease—Counter-part of—Mortgage—Marupat—How must be stamped.

A marupat is a counter-part of a lease or a deed executed by a tenant promising certain rent and must be stamped both as a counter-part and as a mortgage.

Case stated under S. 60, Act II of 1899 by the District Judge of North Malabar in O. S. No. 675 of 1915, on the file of the Court of the District Munsif of Taliparamba.

The District Munsif made the following reference.

The above suit was filed by a landlord against a tenant for recovery of arrears of rent due under a marupat. The plaintiff also prayed for sale of the improvements which the tenant had effected in the property in default of payment of the arrears. This prayer was

* Ref. Case. No. 7 of 1916. 10th October, 1917.

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based upon an express clause in the marupat which when rendered into English reads :—" I have agreed that all the improvements in the paramba belonging to me shall always be liable for the arrears of rent and other dues mentioned above as an encumbrance." This provision seems to come under the definition of the expression " mortgage deed" given in the Stamp Act. I therefore levied the stamp duty payable on the document as if it were a "mortgage deed" and alsopenalty and forwarded the document and certificate under Sec. 35 of Act I of 1879 to the Sub-Collector. He has returned the papers being of opinion that the document is not chargeable with any stamp duty by reason of the above provision. He has based his opinion on Board's proceedings, No. 2389 of 19th August 1885, and a decision in *Eressa Menon* v. *Shamu Patter* [1] upon which the above Board's Proecedings seem to have been based. It seems to me to be doubtful whether the above decision, laying down that a landlord's right to set off the value of improvements against the arrears of rent due to him at the time when he seeks to eject the tenant prevails against any alienation made by the tenant of his right to the improvements, is relevant on the question as to whether, when there is a special clause in a marupat executed by the tenant creating a charge over his improvements in favour of the landlord for arrears of rent, the document does not become chargeable with stamp duty inasmuch as in the latter case the landlord becomes entitled to bring a suit for sale of improvements to recover the arrears of rent at any time, without at the same time asking for ejectment of the tenant, and the right to set off laid down in the above decision would seem to arise only when the landlord seeks to eject the tenant, and not otherwise. In other words a landlord in Malabar would not, it seems to me, be entitled to bring the improvements of lease-hold interest of the tenant to sale for recovery of arrears of rent in the absence of a clause in any document executed by the tenant expressly creating a charge over them for the arrears of rent. When there is such a clause in the document, he is entitled to ask for sale, and, if so, I submit he should be made to pay stamp duty on the document as on an ordinary " mortgage deed."

I have made the reference as the point is of some general importance documents like the one in question coming into courts very often.

The marupat in question was as follows :—

Marupat executed on the 5th Chingam 1075 (20th August 1900) by Ottathyil Moidin to Palakunnath Illath Sreedharan Embrandiri. Agreeing to pay an annual purappad pattam of 214, I have taken charge for Kuzhikkanan and occupancy for, twelve years from this date under this marupat also, of the paramba known as Alimon

1. (1897) I. L. R. 21 M. 188.

Kizhakkeparamaba *alias* Mottammal paramba, which belongs in Jenman to your illam and which belongs to me on Kuzhikkanam assignment right possessed by Adukkadath Veeran having been obtained by me under a document got registered by me this day, and which is described hereunder, in order that sufficient Kuzhukkur ambharavams (fruit trees) may be effected therein in addition to those already existing, and in order that I may dwell in the house which belongs to me, for protecting the ambharavams (trees etc.,) therein ; and therefore I shall pay to you the pattam purappad that may be fixed on inspection at the expiry of 6 years from this date in the case of the ambhravams (fruit trees) that are now existing (?) and from the date they begin to bear fruits in the case of the ambhravams (fruit trees) that may be effected hereafter and I shall take receipt therefor. And at the expiry of the period of 12 years, I shall receive, when offered, the Kuzhikkur chamayam value in accordance with the local custom for all the kuzhikkur chamayams (fruit trees &c.,) belonging to me previously and for those that I may effect hereafter, and as for the house and well, a value of Rs. 15 for the house, and in the case of the well, the expenses as estimated on inspection, and shall surrender the properties to you. But the pattam purappad fixed on inspection as agreed, is kept in arrears without being paid up every year. I consent to the amounts that may be in arrears, being realised together with interest thereon at the usual rate till the date of realisation, and to the properties being recovered possession of from me within the prescribed period after paying to me the Kuzhikkur value. The purappad along with (?) the pattam purappad that may be fixed on inspection would not exceed Rs. 20. I further agree to the amount that may be in arrears on account of the purappad etc., mentioned above, being always charges as Kudikadan (encumbrance) on the entire Kuzhikkur chamayans belonging to me in the said paramba. There are no encumbrances (Kudikadans) whatever on these till now.

The Court delivered the following

Judgment :—A marupat is a counter-part of a lease or a deed executed by a tenant promising certain rent: Moore's Malabar Law.

We think it must be stamped both as a counter-part and as a mortgage.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE OLDFIELD.

Rajagopalachar ... *Appellant* * *(Plaintiff)*

v.

Sundaram Chetty and others ... *Respondents (Defendants Nos. 8 and 1 to 3).*

Raja-gopalachar v. Sundaram Chetty.

Benami Fraudulent transfer—Fraud not effected—Right of real owner to recover—Maxim "allegans turpitudinem inem non est audiendus"—Scope and applicability—Mortgage—Suit for sale by real mortgagee—Deed of mortgage taken in name of plaintiff's natural mother benami for plaintiff for fraudulent purpose—Admission by plaintiff of fraudulent purpose—Right of plaintiff to recover—Fraud not effected—Effect.

Where in a suit for sale on a mortgage, the deed of mortgage itself standing in the name of plaintiff's natural mother, it was either admitted by plaintiff himself or found by the Courts below that the principal amount of the mortgage came out of the estate of one Appanna and that, as there were disputes then going on as to whether plaintiff or one R was the validly adopted son of Appanna, S, Appanna's widow, caused the deed to be executed in the name of plaintiff's natural mother benami for plaintiff with the fraudulent intention of depriving R of his rights to the property in the event of his succeeding in establishing the validity of his adoption, but that, inasmuch as R subsequently renounced his claim to be the adopted son and to the amount of the mortgage deed, no fraud had in fact been effected, *held* that plaintiff was entitled to succeed.

Per The Chief Justice:—It is well settled that, if a plaintiff cannot maintain his cause of action without showing that, as part of such cause of action, he has been guilty of illegality, the Courts will not assist him in his illegality.

But even though plaintiff as part of his cause of action has to prove that the deed was taken benami in the name of another for a fraudulent purpose yet if no fraud has in fact been effected, he is entitled to succeed.

Per Oldfield, J.:—Neither the averment nor proof that the deed was taken benami for a fraudulent purpose was necessary for the establishment of plaintiff's claim and his own admission regarding it was immaterial. The case was therefore not one to which the maxim *allegans turpitudinem suam non estaudiendus* had any application.

Second appeal against the decree of the District Court of Trichinopoly in A. S. No. 124 of 1915 preferred against the decree of the Court of the District Munsif of Namakkal in O. S. No. 592 of 1910.

L. A. Govindaraghava Aiyar and *L. S. Veeraraghava Aiyar* for Appellant.

Hon. V. Rangachariar and *T. M. Krishnaswami Aiyar* for Respondents.

The Court delivered the following

The Chief Justice.

Judgments:—*The Chief Justice*:—The plaintiff first sued as heir of his natural mother Namammal the nominal mortgagee under Exhibit A, the document sued on. The Subordinate Judge in appeal found that he was not entitled to sue as her heir and gave leave to amend the plaint. The plaintiff in his amended plant alleged that the document was taken in the name of his mother for his

* S. A. No. 2053 of 1915. 24th August, 1917.

Raja gopalachar v. Sundaram Chetty, The Chief Justice.

benefit by one Srirangammal, widow of Appanna Iyengar as there were then disputes going on as to whether the plaintiff had been lawfully adopted by Appanna Iyengar and it was desired to benefit him in any event. Both the District Munsif and the District Judge have found that the mortgage money was advanced by Srirangammal, Appanna Iyengar's widow, out of the sale proceeds of properties which had formed part of his estate and had been sold by her under Exhibit C as guardian of the plaintiff and on the footing that he was the adopted son of Appanna Iyengar. They have also found that this was done to defraud Rangasami Iyengar who was also claiming to have been adopted in the event of the disputes ending in his favour and the District Judge applying apparently the maxim *allegans turpitudinem suam non est audiendus* has dismissed the suit. The plaintff's cause of action in the amended claim is 'that the mortgage was taken benami in his name for this fraudulent purpose, and it appears to be well settled, as laid down by A. G. Smith, L. J., in *Scott* v. *Brown, Doering Macnab and Co.* [1] that, if a plaintiff cannot maintain his cause of action without showing that, as part of such cause of action, he has been guilty of illegality, the courts will not assist him in his illegality. See also *Taylor* v. *Chester* [2], *Gordon* v. *Chief Commissioner of Metropolitan Police* [3]. In *Ferret* v. *Hill* [4] a plaintiff who had taken premises for the purpose of using them for prostitution and had been ejected by the landlord for so using them was allowed to recover possession from the landlord, but this has been explained in *Gordon* v. *Chief Commissioner of Metropolitan Police* [3] on the ground that the plaintiff was entitled to possession under his lease and that the purpose for which he acquired the premises was not a matter which he had to prove to establish his cause of action.

In the present case the plaintiff as part of his cause of action has to prove that the mortgage taken in the name of Namammal was benami for him, and the finding is that it was so taken with a fraudulent intention. It is however well settled that this is not a bar to a suit unless a fraud has been in fact effected. *Petherperumal Chetty* v. *Muniandi Servai* [5]. The mortgage money in the present case was the proceeds of certain properties sold by the widow of Appanna Iyengar under Exhibit C and

1. (1892) 2 Q. B. 724. 2. (1869) L. R 4 Q. B. 309 at p. 315.
3. (1910) 2 K. B. 1080. 4. (1869) 15 C. B. 207.
5. (1908) 18 M. L. J. 277=35 I. A. 98.

Raja-gopalachar v. Sundaram Chetty, — The Chief Justice.

Rangasami Iyengar having by Exhibit D renounced his claim to be the adopted son and to the properties comprised in Exhibit C, it follows in my opinion that no fraud has been effected in this case and the plaintiff is entitled to succeed. I would reverse the decision of the lower appellate court and restore that of the District Munsif with costs throughout.

Oldfield, J.

Oldfield, J.:—With all respect I am not at present clear that the present case is one of those, in which the plaintiff cannot maintain his cause of action without showing, as part of it that he or a person, under whom he claims, has been guilty of illegality. No doubt in his plaint, as amended, he said that " the amount of the suit land was given from the estate of his adoptive father by his adoptive mother for his benefit and the document was obtained in the name of his natural mother benami having in view the litigation that was going on then regarding his adoption; and this was an admission of a wrongful conversion, which no attempt has been made to defend. But it has not so far been shown that this averment or proof of it was necessary for the establishment of plaintiff's case; or that more was required than proof that his natural mother, the ostensible mortgagee, had the funds and invested them, whatever their origin, for plaintiff's benefit in a manner which was innocent in itself, in the suit mortgage. If such proof could be given without reference to that origin, it and plaintiff's admission regarding it would be immaterial. The distinction involved is justified by reference to *Tassell* v. *Cooper* [1], *Farmer* v. *Russel* [2] and *Gordon* v. *The Chief Commissioner of Metropolitan Police* [3], the plaintiff in the two last mentioned cases having actually alleged and given evidence of a tainted origin for the money claimed. This aspect of the case was not present to the minds of the lower courts; and, if these were the only facts, I should hold that a remand in order to its consideration would be necessary.

There is however Exhibit B, which, I agree with my Lord, covers the land, from the sale of which the money lent under the suit mortgage was derived, and the money itself, and whether the result of that document is to negative the carrying out of any fraud on its executant or, as I should with all due deference prefer to hold, to vest in plaintiff the ownership of the land or the money which now represents it, the result is the same, that plaintiff is entitled to sue. I concur in the decision proposed.

A. S. V.

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1. (1850) 9. C. B. 509.
2. (1798) 1 Bos. &. P. 296.
3. (1910) 2 K. B. 1080,

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE AYLING AND MR. JUSTICE KUMARASWAMI SASTRI.

F B.

Doraisami Aiyar v. Subramania Aiyar.

Doraisami Aiyar and others ... *Appellants* (Plaintiffs).*

v.

T. Subramania Aiyar and others ... *Respondents (Defendants).*

Civil Procedure Code (V of 1908) S. 11 Explanation V, and O. 20, R. 12—Suit for possession and mesne profits—Decree silent regarding claim for future mesne profits—Fresh suit for such profits, not barred.

Where after a suit for possession of lands and mesne profits past and future, had been brought and decided and a decree had been obtained for possession and past mesne profits without the claim to future mesne profits being decided, a second suit was brought to recover mesne profits from the institution of the first suit till delivery of possession.

Held, by *Wallis, C. J.* and *Kumaraswami Sastri, J.* (*Ayling, J.* dissenting) that the second suit was maintainable. *Ramaswami Aiyar* v. *Sri Rangaraja Aiyangar* [1] dissented from.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Tanjore in Appeal Suit No. 680 of 1914, preferred against the decree of the court of the District Munsif of Tiruvadi in Original Suit No. 20 of 1914.

This Second Appeal came on for hearing in the first instance on 4th May 1917 before their Sadasiva Aiyar and Spencer, JJ. when they made the following

ORDER OF REFERENCE TO A FULL BENCH:—

This is a suit for mesne profits. The plaintiffs brought a previous suit (O. S. No. 288 of 1909) for partition of family property including a prayer for mesne profits.

They obtained a decree directing a division to be made into five equal shares and awarding Rs. 108 for past mesne profits. The judgment was silent on the subject of future mesne profits.

In the present suit the District Munsif gave the plaintiffs a decree for the recovery of Rs. 254-8-0 mesne profits accruing after the institution of O. S. No. 288 of 1909, but on appeal, the Subordinate Judge dismissed the suit with the remark that although his decision might seem hard, he was bound by the ruling in *Ramaswami Aiyar* v. *Sri Rangaraja Aiyangar* [1], to hold that no separate suit could be brought for mesne profits claimed in a

* S. A. No. 100 of 1916. 26th October, 1917.

1. (1914) 2 L. W. 8.

F. B.

Doraisami Aiyar v. Subramania Aiyar.

previous suit as the matter was *res judicata* by reason of the former decision.

Under the Code of 1882 it was well settled by a Full Bench decision of this Court, *Kuppusamy Aiyar* v. *Venkataramier*, [1] that such a suit would lie. The same principle was upheld in Calcutta in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council*, [2] (see the observations of Ameer Ali, J. at pages 970 and 971 on the discretionary form of S. 211 of the Code of Civil Procedure, 1882). It was also decided by another Full Bench that claims for possession and claims for mesne profits form separate causes of action under the old Code and under the new Code (*vide Ponnammal* v. *Ramamirtha Aiyar* [3]).

The learned Judges who decided *Ramaswami Aiyar* v. *Sri Rangaraja Aiyangar* [4] base their opinion on the change of language in the Code of 1908. They say that in this Code, S. 211 of the Code of 1882 disappears altogether, and, as Order 20, Rule 12 now reads, it is made equally a matter of discretion with Courts to direct an enquiry into future mesne profits as it is to pass a decree for possession or for future mesne profits.

With due respect to those learned Judges, we are unable to see that there has been any substantial change of language. S. 211 has not disappeared, but combined with S. 212 it has been recast into Order 20, Rule 12.

S. 211 declared "the Court may provide in the decree" for the payment of future mesne profits. Order 20 Rule 12 (1) (c) declares that "the Court may pass a decree . . . . . . directing an enquiry as to rent or" future mesne profits.

S. 212 permitted the Court either to determine the amount of past mesne profits by the decree itself or to pass a decree for the property and direct an enquiry into the amount of mesne profits. Order 20, Rule 12 (1) (*a*) and (*b*) is to the same effect. The only essential in procedure is that under the new Code mesne profits are not to be left to be determined in execution.

A more important change and one to which the judgment in *Ramasami Aiyar* v. *Srirangaraja Aiyangar* [4] contains no allusion, is the omission of the proviso to S. 244 from S. 47 of the new Code. This ran as follows:—" Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the

1. (1903) 15 M.L.J. 462.
2. (1890) I.L.R. 17 C. 968.
3. (1914) I.L.R. 38 Mad. 829: 28 M.L.J. 127 (F.B.)
4. (1914) 2 L. W. 8

institution of the first suit and the execution of the decree therein where such profits are not dealt with by such decree." F. B.

Doraisami Aiyar v. Subramania Aiyar.

It may be that these words were omitted because they were considered superfluous. Similarly a provision that a claim for the recovery of land and a claim for mesne profits from such land should be deemed to be distinct causes of action, found place in the Code of 1859 but dropped out of the Code of 1882 for the reason that it became superfluous, as explained in *Ponnammal* v. *Ramamirtha Aiyar* [1] but this did not prevent the Court from arriving at a conclusion that such claims constitute separate causes of action in the present state of the law.

The use of the word 'may' in Order 20, Rule 12, like the same word in the old S. 211, seems to indicate that it is discretionary with the Court to award future mesne profits. The plaintiff could not insist on them being granted to him because at the date of the first suit the cause of action for mesne profits is not completed. In this connection the use of the word 'shall' in Order 20, Rule 16 which deals with suits for accounts may be compared with the use of the word 'may' in Order 20, Rule 12.

As regards the question of *res judicata* S. 11, explanation 5 declares that any relief claimed in the plaint, which is not expressly granted by the decree, shall be, for the purposes of this section, deemed to have been refused. But if mesne profits were claimed in the first suit and through mistake or oversight they were neither granted nor refused, the section will not prevent a second suit being instituted for their recovery, when the relief claimed in the plaint is a relief which the Court was not bound to grant if the defence failed. This is made clear in *Kuppusami Aiyar* v. *Venkataramier* [2].

The case in *Ramaswami Aiyar* v. *Srirangaraja Aiyangar* [3] has since been followed in C. R. P. No. 858 of 1913 (unreported), but one of the two learned Judges who decided it was a party 1½ months later to *Thavasi* v. *Arumugam* [4] which followed *Kuppusami Aiyar* v. *Venkataramier* [2] without referring to the more recent decision under the Code of 1908. The other learned Judge was a party to the Full Bench in *Ponnammal* v. *Ramamirtha Aiyar* [1] which proceeds on considerations not easily reconcilable

1. (1914) I. L. R. 38 M. 829=28 M. L. J. 127 (F. B.)
2. (1903) 15 M. L. J. 462.
3. (1914) 2 L. W. 8.
4. (1915) M. W. N 170.

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with those upon which *Ramasami Aiyar* v. *Srirangaraja Aiyangar* [1] was decided.

We are inclined to the opinion that *Ramasami Aiyar* v. *Srirangaraja Aiyangar* [1] was wrongly decided and requires reconsideration and as the question involved is of considerable importance and of frequent occurrence, we refer to the decision of a Full Bench the question whether after a suit for possession of lands and mesne profits past and future has been brought and decided and a decree has been obtained for possession and past mesne profits without the claim to future mesne profits being decided, a second suit will lie to recover mesne profits from the institution of the first suit till delivery of possession.

C. V. Ananthakrishna Aiyar for the Appellant.

S. T. Srinivasagopalachari for the Respondents.

The Court expressed the following

Wallis, C. J.

Opinion:—*Wallis, C.J.* :—I agree with the referring Judges. Explanation V to S. 11 of the present Code of Civil Procedure is in exactly the same terms as the corresponding explanation III to S. 13 in the Code of 1882. Under the Code of 1882 it was held by a Full Bench of this Court in *Kuppusamy Aiyar* v. *Venkataramier*, [2] in conformity with the decisions of other High Courts that the word "relief" in the explanation means relief arising out of a cause of action which had accrued at the date of suit and on which the suit was brought, and did not include relief such as mesne profits accruing after the date of suit as to which no cause of action had then arisen, but which the Court was nevertheless expressly empowered to grant. The explanation having been reproduced in exactly the same words, the presumption is that it was intended to have precisely the same effect. I do not find any sufficient indication to rebut this presumption in the fact that Ss. 211 and 212 of the old Code were amalgamated to form Order 20, Rule 12. The change introduced by the new rule is that the award of mesne profits in all cases is to be by preliminary decree, and that when ascertained they are to be embodied in a final decree, whereas under Ss. 211 and 212 they were to be ascertained in execution. This change does not appear to me to affect the construction of explanation V to S. 11, nor do I think is effected by the omission in S. 47 of the new Code of the proviso to the corresponding S. 244 of the old Code. I answer the question in the affirmative.

1. (1914) 2 L. W. 8.
2. (1903) 15 M L. J. 462.

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Ayling, J.:—I regret that I am unable to concur. The point referred is identical with that considered by Hannay, J. and myself in *Ramasami Aiyar* v. *Sri Rangaraja Aiyangar* [1] and with all respect after hearing it reargued I remain of the same opinion.

I would answer the question in the negative.

Kumaraswami Sastri, J.:—The question referred to us for decision is "whether after a suit for possession of lands and mesne profits past and future has been brought and decided and a decree has been obtained for possession and past mesne profits without the claim to future mesne profits being decided, a second suit will lie to recover mesne profits from the institution of the first suit till delivery of possession".

I agree with the Chief Justice whose Judgment I have had the advantage of perusing and with Sadasiva Aiyar and Spencer, JJ., the referring Judges that the question should be answered in the affirmative.

As there has been no adjudication as to future mesne profits the second suit can only be barred if it can be brought under explanation V to S. 11, Civil Procedure Code, 1908. It is now well settled that the word 'relief' in explanation V mean a relief which the plaintiff can claim as a matter of right in respect of a cause of action which has accrued to him at the date of suit and that relief in respect of future mesne profits is not claimable as a matter of right no cause of action accruing to the plaintiff at the date of suit in respect of the future injury he might suffer if the defendant continues to be in wrongful possession in spite of the suit and that explanation III of S. 13 of the Code of 1882 which is the same as explanation V of S. 11 of the Code of 1908 will not bar a second suit. *Mon Mohun Sircar* v. *The Secretary of State for India in Council* [2], *Jiban Das Oswal* v. *Durga Pershad Adhikari* [3], *Bhivrav* v. *Sitaram* [4], *Ram Dayal* v. *Madan Mohan Lal* [5] and *Kuppusawmy Aiyar* v. *Venkatramier* [6].

There is nothing in the present Code that alters the nature of the claim for future mesne profits. It is still a claim in respect of a cause of action that has not accrued to the plaintiff at the date of suit and it cannot be contended after the recent decision of the Full Bench in *Ponnammal* v. *Ramamirtha Aiyar* [7], that if the

1. (1914) 2 L. W 8.
2. (1890) I. L. R. 17 C. 968.
3. (1893) I. L. R. 21 C. 252.
4. (1894) I. L. R. 19 B. 532.
5. (1899) I. L. R. 21 A. 425.
6. (1903) 15 M. L. J. 462.
7. (1914) I. L. R. 38 M. 829=28 M. L. J. 127. (F. B.)

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plaintiff had omitted to ask for the relief in his plaint a separate suit would be barred.

The main contention for the respondents is that Order 20, Rule 12 has now rendered it obligatory on the Court to pass a decree as to mesne profits from date of suit to date of delivery of possession if the plaintiff makes out a claim for such relief and that consequently the decisions under the Code of 1882 have no application.

I do not think that the Code of 1908 which enacts as Order 20, Rule 12 what was contained in Ss. 211 and 212 of the Code of 1882 has made any material alteration in the nature of the claim as to future mesne profits. Rule 12 provides that the Court may pass (1) a decree for possession of the property (2) a decree for rent or mesne profits up to suit or direct an enquiry as to the same and may (3) direct an enquiry as to future mesne profits. It provides for a final decree being passed after the enquiry directed is made and the liability ascertained. So far as clause (c) of Order 12 is concerned the power of the Court is still discretionary as all the Order does is to provide that the Court *may* pass a decree directing an enquiry as to rent or mesne profits from the institution of the suit till the period provided for by clauses (i), (ii), and (iii). It has been argued that even as regards clauses (a) and (b) the word used is "may" and not "shall" though the Court is bound to pass a decree in terms of clauses (a) and (b) if plaintiff's claim is established. S. 212 of the old Code provides that the Court may either determine the amount by the decree itself or may pass a decree for the property and direct an enquiry into mesne profits and dispose of the same on further orders and the legislature in including in one section what was embodied in two by using the word 'may' which occurred in both the sections cannot be said to have introduced any new principle as regards future mesne profits. When different claims are dealt with in one rule under various sub-sections the fact that the word 'may' should be construed as 'shall' in respect of one of the sub-sections owing to nature of the claim which it deals with does not necessarily mean that the word cannot be construed in its ordinary sense as regards other clauses. With all respect I am unable to agree with the decision in *Ramaswamy Aiyar* v. *Sri Ranga Raja Aiyangar* [1] that the grouping into one section of past and future mesne profits affects the nature of future mesne profits so as to attract to it the

1. (1914) 2 L. W. 8.

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provisions of explanation V to S. 11. The omission of the proviso to S. 244 in S. 47 of the Code of 1908 is due to the fact that under the Code of 1908 the determination of questions as to mesne profits was to be in the suit itself and not subsequent to decree in execution proceedings. Under the scheme of the present Code there is no necessity for any such proviso to S. 47 which corresponds to S. 244 of the old Code.

There being in my opinion no material difference between S. 211 of the old Code and rule 12 clause (c) of Order 20 of the present Code there is no reason for departing from the decisions of this and the other High Courts as to the second suit not being barred by explanation V of S. 11 of the Code.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT:—MR. JUSTICE AYLING, MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE BAKEWELL.

Subramania Aiyar and another ... *Appellants** (*Plaintiffs*).

v.

A. L. V. R. R. M. Muthia Chettiar (dead) and others ... *Respondents* (*Defendants & L. Rs. of the 1st defendant*).

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C. P. Code (V of 1908) O. 21 R. 63—Suit for declaration by unsuccessful claimant—Attaching decree-holder, defendant—Plea that sale was fraudulent under S. 53 of the Transfer of Property Act, if open—Remedy of creditors.

Where an unsuccessful intervenor in claim proceedings, institutes a suit under O. 21 R. 63 of the C. P. Code for declaration of his title as vendee from the judgment-debtor and for cancellation of the summary order dismissing his claim, it is not open to the judgment-creditor (defendant) to resist the plaintiff's suit on the ground that the sale to the plaintiff was a fraud on the creditors of the vendor, unless the transfer had been previously avoided by the creditor in a properly instituted suit. *Palaniandi Chetty* v. *Appavu Chettiar* [1], approved.

Second appeal against the decree of the Court of the Subordinate Judge of Coimbatore in A. S. No. 14 of 1916, preferred against the decree of the Court of the Additional District Munsif of Erode in O. S. No. 203 of 1915.

[This Second Appeal came on for admission before and Sadasiva Aiyar, and Napier, JJ. who made the following order.]

"Post before a Full Bench as we think that the correctness of the judgments in *Palaniandi Chetti* v. *Appavu Chettiar* [1] ought to be considered by a Full Bench on the questions whether a suit ought to be brought by creditors to set aside a deed voidable

* S. A. No. 691 of 1916. 18th September, 1917.

1. (1916) 30 M. L. J. 565.

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as against creditors before it could be declared void and whether such a suit could be brought by a single creditor in his own interest or ought to be brought on behalf of all the creditors."

A. Krishnaswami Aiyar for *L. S. Veeraraghava Aiyar*, for Appellants.

V. C. Seshachariar and *M. Raghavachari* for Respondent.

The court delivered the following

Ayling, J.

Judgments:—*Ayling, J.*:—In this case the appellants (plaintiffs) are purchasers of the suit property from 2nd defendant by a sale-deed, Ex. A dated 20-6-1904. First. defendant subsequent to this sale obtained a decree against 2nd defendant in S. C. S. No. 1960 of 1905, and in 1913 attached the suit properties in execution. Plaintiffs preferred a claim on the dismissal of which they filed the present suit for declaration of their title, and for cancellation of the summary order on their claim.

The suit failed in both the lower courts, the Subordinate Judge holding in 1st appeal that the sale was a fraudulent transaction intended to defeat or delay 2nd defendant's creditors though not a mere sham transaction.

It is now argued in secoud appeal that it is not open to 1st defendant to set up such a defence in the present suit; and that the sale must be held good against him unless and until he obtains a decree setting it aside in proceedings suitably instituted for that purpose. Mr. A. Krishnaswami Aiyar relies on a recent ruling of this court, reported in *Palaniandi Chetti* v. *Appavu Chettiar* [1] and the Second Appeal appears to have been specially ordered to be heard by us with a view to the correctness of this ruling being considered by a Bench of three Judges.

Speaking for myself I have carefully considered the judgment in the case referred to and the arguments of Mr. Seshachari who has endeavoured to show us that the decision is wrong. The facts are absolutely analogous to those in the present case. It is unnecessary for us in the present case to consider whether a suit by a creditor to avoid an alienation as infringing against S. 53 of the Transfer of Property Act must be brought in a representative capacity on behalf of the body of creditors; but apart from this I have no hesitation in concurring in the views expressed by Coutts Trotter and Seshagiri Aiyar, JJ., in that case. The only case quoted by Mr. Seshachari which has not been dealt with in their judgment and which appears to have any bearing on the question is a Calcutta case not reported in the regular series (*Abdul Kadir* v. *Ali Mia* [2]). With all respect, I cannot agree with the decision. I

1. (1916) 30 M. L. J. 565. 2. (1912) 15 C. L. J. 649.

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do not find in it sufficient authority for the proposition advanced by Mr. Seshachari that anything which can be made the basis of a suit can be pleaded as a bar in action and I agree with my learned brother Seshagiri Aiyar, J. in *Palaniandi Chettiar* v. *Appavu Chettiar* [1] that a sale such as the one we are considering must be held to continue in force until it is set aside in proceedings properly instituted for the purpose.

It follows that the decrees of the lower courts in the present suit should be set aside and plaintiffs be given a decree as sued for with costs throughout.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—I agree. The further arguments addressed to us by Mr. Seshachariar have not convinced me that my view in *Palaniandi Chettiar* v. *Appavu Chettiar* [1] is wrong and that an attaching creditor as defendant can obtain a declaration that the sale by his judgment-debtor which he has not sued to set aside is in fraud of his and other claims against the common judgment-debtor and that on that ground the suit should be dismissed.

Bakewell, J.:—I agree.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE AYLING AND MR. JUSTICE KUMARASWAMI SASTRI.

Annamalai Chettiar ... *Appellant, (25th Defendant).*

v.

Palamalai Pillai and others ... *Respondents, (Plaintiffs 2 to 4).*

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Civil Procedure Code (Act V. of 1908) S. 64—Explanation—Application for rateable distribution by non-attaching decree-holder—Private alienation by judgment-debtor, if valid.

Non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise, are not entitled to avoid a private alienation by the judgment-debtor made during the continuance of such attachment.

Mina Kumari Bibi v. *Bijoy Singh Dudhuria* [2] relied upon.

Second Appeal against the Decree of the District Court of Tanjore in Appeal Suit No. 40 of 1914, preferred against the Decree of the Court of the Subordinate Judge of Kumbakonam in Original Suit No. 2 of 1912.

* S. A. No. 990 of 1915. 26th October, 1917.

1. (1916) 30 M.L.J. 565. 2. (1917) I.L R 44 C. 662 ; 32 M. L. J. 425.

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The Court (Seshagiri Aiyar and Bakewell, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Seshagiri Aiyar, J.:—The 29th defendant was heavily indebted and a large number of decrees were passed against him. A number of execution applications were presented under those decrees. We are concerned at present only with three of them, namely applications in the decree in O. S. No. 22 of 1909, in the decree in O. S. No. 8 of 1910 and the decree obtained by the 25th defendant in O. S. No. 32 of 1909. The allegation of this last decree-holder is that the 29th defendant with a view to defraud him and the other creditors executed a sale-deed nominally in favour of the plaintiff. The deed is dated the 5th June 1910. When an application for attachment was made against the properties in suit, the plaintiff put in a claim petition alleging that they were his and that they should be released from attachment. The Subordinate Judge of Kumbakonam held that the claim was fraudulent and dismissed it. Thereupon the present suit was instituted for a declaration that the sale is valid. The first court held that no consideration passed for the sale and that the plaintiff and the 29th defendant colluded together to defraud the creditors. On appeal, the District Judge differed from the Subordinate Judge on this question and held that the sale was supported by consideration. Hence this Second Appeal by the 25th defendant. The learned Advocate-General does not contest the finding as to consideration. He contended that even on that finding, the sale should be held invalid. The question of law now argued was raised in both the lower courts, but has not been adequately dealt with by either of them. The contention of the learned Advocate-General is that as at the time of the sale to the plaintiff an attachment of the properties was subsisting, although his client was not the attaching creditor, he is entitled to take advantage of the attachment as his client had applied under S. 73 of the Code of Civil Procedure for rateable distribution. The attachment referred to was in O. S. No. 22 of 1909. Exhibit DDD is the execution application. On that application the properties were attached on the 22nd January 1910. On that day, the application was adjourned for taking further steps to the 9th February 1910. The application was ultimately dismissed on the 29th March 1910. The contention of Mr. Rangachariar, the

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learned Vakil for the respondents, is that this dismissal operated to put an end to the attachment made in January 1910 and that therefore at the time of the sale to the plaintiff, there was no subsisting attachment. It may be mentioned that against this dismissal, the decree-holder in O. S. No. 22 of 1909 appealed to the High Court. The order of the High Court is Exhibit DDD2. The dismissal was confirmed. It was argued before us that the appeal was really withdrawn. But as the matter has not been enquired into, I prefer not to express any opinion on that question. Notwithstanding the dismissal of the petition by the Subordinate Judge and the dismissal of the appeal by the High Court, the properties were directed to be sold under the original execution application. Thereupon the present plaintiff put in a claim petition. Exhibit VIIc, for releasing the property from attachment and to prevent the threatened sale. The claim was enquired into by the Subordinate Judge and it was contended before him that the attachment ceased to exist by the dismissal of the petition on the 29th March 1910. He, however, held that the attachment subsisted. It may be that this conclusion is not *res judicata* as the present appellant was not a party to the proceedings. It has, however, to be found whether there was default on the part of the decree-holder and whether in consequence of that default, his application was dismissed. Consequently, if it is necessary to express a final opinion on that question, I would ask the lower court to return a specific finding as to whether the dismissal of the 29th March 1910 was due to want of prosecution on the part of the decree-holder in O. S. No. 22 of 1909. Another disputed point should also be mentioned before dealing with the question of law. The present appellant's decree was obtained in O. S. No. 32 of 1909. It is dated the 22nd September 1909. He applied for execution on the 4th January 1910. It is said that this application also was dismissed for want of prosecution and that therefore on the date of the sale to the plaintiff, the 25th defendant's application for rateable distribution was not pending. That question again has not been considered by the courts below. They seem to have taken it for granted that he would be entitled to rateable distribution. It may become necessary to call for a definite finding on this question as well.

As regards the attachment in O. S. No. 8 of 1910, it is enough to point out that that was issued by the District Court of Tanjore,

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and as neither the 25th defendant nor the other decree-holders had their decrees transferred to the District Court, the attachment under that decree is of no value to them.

Now I proceed to consider the question of law argued by the learned Advocate-General. The contention of the learned Vakil for the respondents was that as the decree in O. S. No. 22 of 1909 was satisfied in September 1911, the sale to his client was not obnoxious to S. 64 of the Code. Broadly put, Mr. Rangachariar's reasoning is that in order that a private alienation during the pendency of an attachment may be caught by S. 64, the particular attachment under which the 25th defendant and the other decree-holders claim should have resulted in the realisation of the assets. If the matter were *res integra*, and if I were not hampered by precedents, I would have found great difficulty in accepting this contention. In my opinion, the legislature by S. 73 has enabled decree-holders other than the one who attaches the property to reap the benefit of his labours, provided they comply with certain requirements. The attaching decree-holder is *dominus litis*. He alone can apply to bring the property to sale, and he is entitled in the first instance to get his expenses paid out of the sale proceeds. Subject to this reservation, he holds no higher position than the other decree-holders who have applied for rateable distribution prior to the realisation of the assets. The object is on the one hand not to harass the judgment-debtor by too many applications for attachment by decree-holders, and on the other, to relieve the various decree-holders from the necessity of applying for separate attachments when their object can be gained by taking shelter under a pre-existing attachment. Such an attachment, although it does not prevent the decree-holders from separately attaching the property secures to them a benefit without themselves attaching the properties. Consequently, the attaching creditor is in a sense the representative of all the other decree-holders.

The language of the section as well as of the explanation suggests that if at the time of the private alienation there was a subsisting attachment, all persons who could have enforced their claim for rateable distribution should have the benefit of such an attachment. In the explanation, the language is "claims enforceable under an attachment" and not "enforced under an attachment." The other construction would enable an attaching decree-

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holder to enter into a fraudulent compromise with the judgment-debtor and the private alienee and thus defeat all the claims for rateable distribution. I do not think the legislature contemplated such a state of affairs; but the course of decisions under S. 276 of the old Code of Civil Procedure and under S 64 of the new Code are all one way. Under the old Code, there were two classes of decisions. In the one, it was held that it is the attaching decree-holder alone that can avoid a private alienation. *Manohar Das* v. *Ram Autar Pande* [1] has taken this view. The other view was that all persons who would be entitled to rateable distribution have the right to impeach a private alienation if the attachment under which they claim was subsisting. The able and exhaustive judgment of Mr. Justice Telang in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another* [2] enunciates this proposition. In that judgment, the learned Judge discussed *Durga Churn Rai Chowdhry* v. *Monmohini Dasi* [3] and *Ganga Din* v. *Khushali* [4] where it was held that if the attachment ceased to have force by the decree being satisfied, other decree-holders could derive no benefit under it. Mr. Justice Telang apparently accepted this view as correct. The same view was held in Madras under the old Code: *Kunhi Moossa* v. *Makki* [5], *Vibudhapriya Tirthaswami* v. *Yusuf Sahib* [6] and *Venkatarama Iyer* v. *Esumsa Rowthen* [7]. In this state of the authorities the Act of 1908 was passed and it introduced the explanation to S. 64 which did not exist under the old Code. It is clear that the legislature intended to uphold the view of Mr. Justice Telang, as against the view of the Allahabad Judges in *Manohar Das* v. *Ram Autar Pande* [8]. If the legislature intended to go further, the language could certainly have been clearer. It must be noticed that until the new Act was passed. There was no decision which went to the length of holding that even though the decree of the attaching creditor had been satisfied, still the other decree-holders would be entitled to impeach the private alienation, provided at the time of the private alienation, they had applied for rateable distribution. The natural inference to be drawn from the action of the legislature is that the explanation to S. 64 was intended to give legislative sanction to the view enunciated by Mr. Justice Telang in *Sorabji Edulji Warden* v. *Govind*

1. (1903) I. L. R. 25 All. 431.
2. (1891) I. L. R. 16 Bom. 91.
3. (1888) I. L. R. 15 Cal. 771.
4. (1885) I. L. R. 7 All. 702.
5. (1899) I.L.R. 23 M. 478=10 M. L. J. 98.
6. (1905) I. L. R. 28 Mad 380=15 M. L. J. 202.
7. (1909) I. L. R. 33 Mad. 429=20 M. L. J. 330.
8. (1903) I. L. R. 25 All. 431.

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Ramji, F. N. Wadia and another and no more. Since the explanation, there have been some decisions in Bombay. The other High Courts have not dealt with the question. In *Khushalchand* v. *Nandram Shebram* [1] in *Jetha Bhima and Co.*, v. *Lady Janbai* [2] and in *Jetha Bhima and Co.* v. *Lady Janbai* [3] the learned Judges of the Bombay High Court have held that if the decree under which an attachment was made was satisfied, other decree-holders who had applied for rateable distribution will not be entitled to impeach the alienation. In *Bibi Miyakhan* v. *Gulabchand* [4] apparently, a different view was taken. But it is pointed out in *Jetha Bhima and Co.*, v. *Lady Janbai* [2] by Mr. Justice Beaman that the learned Judges who decided *Bibi Miyakhan* v. *Gulabchand* [4], disclaimed any intention of enunciating the proposition imputed to them. Moreover one of the learned Judges who took part in *Bibi Miyakhan* v. *Gulabchand* [4], was a party to the decision in *Khushalchand* v. *Nandram Sahebram* [1], and in *Jetha Bhima and Co.*, v. *Lady Janbai* [3]. Under these circumstances, I would have held that as the decree in O. S. No. 22 of 1909 was satisfied, the 25th defendant and persons like him are not entitled to question the private alienation made in favour of the plaintiff. But my learned brother is inclined to take a different view, and as I have said before, the language of the section and reason and justice are in favour of the broader proposition contended for by the learned Advocate-General.

Since writing the above, I came across the decision of the Judicial Committee in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* [5]. Although the decision was under the old Code, in the argument, Counsel referred to the new Code as well. The Board seem to doubt the correctness of I. L. R. 16 Bom. 91. Further they lay down that an attachment which does not finally fructify is of no avail. I drew the attention of my learned colleague to the judgment. He thinks that as the decision was under the old Code, it is not binding on us, having regard to the explanation added to the new Code. I would, therefore, refer for the decision of the Full Bench the following question:—

"Whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise are entitled to question a private alienation made during the continuance of such attachment?"

1. (1911) I. L. R. 35 B. 516. 2. (1912) 14 Bom. L.R. 511.
3. (1912) I. L. R. 37 Bom. 188. 4. (1911) 13 Bom. L. R. 1189.
5. (1916) L. R. 44 I. A. 72 : 32 M. L. J. 425.

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Bakewell, J:—In order that a judgment-creditor may obtain a rateable distribution of assets of his debtor, he must have applied for execution of his decree to the Court by which the assets are held before the receipt thereof. This claim may therefore be made either before or after property of the debtor has been attached and must be made before the proceeds of that property have been received by the Court, but it subsists independently of the attachment. Where assets result from the sale of immoveable property, any person entitled to share in a rateable distribution thereof may apply to the Court to set aside the sale, (Order 21, Rule 90); and, since an order setting aside a sale destroys the fund in which he claims a share, I think that such a person's interests are affected within the meaning of Rule 92 and that he should be given notice of an application for such an order. For the purposes therefore of challenging and upholding a sale of his debtor's property a person entitled to rateable distribution may become a party to proceedings instituted by a rival judgment-creditor.

The Code does not declare the procedure to be observed upon the distribution of assets, but, since it is a general principle that all persons interested in a fund are entitled to appear and to be heard when it is dealt with, and since a person cannot complain that his interests have been neglected if he has failed to bring them to the notice of the Court and the other claimants, I think that each claimant should present an application in the execution proceedings instituted for the realisation of assets and should give notice thereof to the decree-holder who is prosecuting them. He will then be entitled to notice of any application relating to the assets and to this extent at least is in the position of a party to the execution proceedings. As my learned brother has pointed out, this procedure avoids multiplicity of proceedings in execution of decrees against the same debtor and the resulting complications. An attachment of immoveable property is effected by an order prohibiting the debtor from dealing with the property and all persons from taking any benefit from such dealing, and by a proclamation and publication of this order intended to give notice thereof to all persons interested. *Prima facie* a public injunction of this kind should only be dissolved by an express order of the Court upon notice to the parties interested. The explanation to S. 64 of the

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Code declares that the words used therein "claims enforceable under the attachment" include "claims for the rateable distribution of assets," and accordingly I think that the section should be read as providing that where an attachment has been made, any private transfer of the property attached shall be void as against all claims enforceable under the attachment or for the rateable distribution of assets to be realised thereunder.

Having regard to the above provisions, I think that it was the intention of the legislature to place claimants for rateable distribution of assets as far as possible in the same position as the decree-holder who is actively prosecuting the proceedings from which all expect to benefit and no order should be passed by the Court which may affect their interests without notice to them, such, for instance, as an order raising an attachment or directing satisfaction to be entered of the decree which is in course of execution.

The Bombay cases and the decision in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* [1] which have been cited, were with reference to the Code of 1882, from which the present Code differs largely both in form and matter, and with all respect I deprecate the use of decisions under the former law for the purpose of construing a comprehensive enactment such as the Code of Civil Procedure when the provisions construed are not identical.

I agree with the reference proposed by my learned brother.

K. Rajah Aiyar (*The Hon'ble The Advocate General* with him for the Appellant.

T. Rangachariar, *E. Doraisami Aiyar* and *K. R. Narayanaswami Aiyar* for the Respondents.

The Court expressed the following

Wallis, C. J.

Opinion :—*Wallis, C. J.*, :—The question is as to the effect of the explanation added to S. 64 (formerly S. 276) of the Code of Civil Procedure of 1908 that for the purposes of the section "claims enforceable under an attachment include claims for the rateable distribution of assets". It had been held by the Courts in India that decree-holders other than the attaching decree-holder acquired no right to rateable distribution under S. 295 (now 73) of the Code until assets had been realized in execution, and Sir Lawrence Jenkins delivering the judgment of the Judicial Committee has

1. (1916) I. L. R. 44 I. A. 72 : 32 M. L. J. 425.

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observed in the recent case in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* [1]. "To bring S. 295 into play certain conditions are necessary, and one of them is that there should be assets held by the Court". Applying this principle the Indian Courts held under S. 276 that, if the judgment-debtor has satisfied the claim of the attaching decree-holder even by alienating the attached property, that does not give the other decree-holders who have applied for execution any right to question the alienation; and in the case referred which was decided with reference to the old Code, the Judicial Committee seem to have gone if anything further and have held that the attaching decree-holder himself cannot object to a private alienation by the judgment-debtor subsequent to the attachment unless the attached property has been brought to sale in execution of the decree in respect of which the property was attached. In that case a decree-holder, who had attached and brought to sale and purchased the suit property subsequently to a private alienation by the judgment-debtor, was held not to be entitled to defend his title as against the alienee from the judgment-debtor under S. 276 by relying on the fact that before the date of the alienation he had attached the suit property in execution of another decree without bringing the property to sale, in execution of that decree. In these circumstances, it was held that S. 276 did not protect him.

S. 64 of the present Code affords no greater protection to the attaching decree-holder than S. 276 of the old Code, and if he cannot protect himself against an alienation after attachment unless the attached property is brought to sale in execution of the decree in respect of which the attachment was made, it necessarily follows that other decree-holders who have applied for execution cannot be in any better position. It may even be said that, as regards other decree-holders, the language used in the body of of S. 64 is if anything less favourable than the language of S. 276, because it only renders void as against the claimants specified alienations which are "contrary to such attachment," and an alienation by means of which the decree in execution of which the attachment was made is satisfied can scarcely be regarded as an alienation contrary to the attachment.

As pointed out by Seshagiri Aiyar, J., full effect is given to the Explanation to S. 64 by regarding it as intended to settle the difference between *Sorabji Edulji Warden* v. *Govind Ramji, F. N.*

1. (1916) L. R. 44 I. A. 72, 78=32 M. L. J. 12.

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Wadia and another [1], and *Manohar Das* v. *Ram Autar Pande* [2] in favour of the Bombay decision. Further, if it had been intended to prevent all alienations of the attached property after attachment unless made in execution of the decree and for the benefit of the decree-holders entitled to rateable distribution under S. 73 (formerly S. 295), the legislature would have said so plainly. On the contrary, not only is the language of the body of S. 64 if anything more restrictive than the language of S. 276, but the legislature has strengthened the provisions of the former S. 275 by providing in Order 21, Rule 59 that on satisfaction of the decree, whether made through the Court or certified to the Court, the attachment shall be deemed to be withdrawn, whereas S. 275 only provided for its being withdrawn in such event on the application of any person interested. There are other alterations pointing the same way which are fully dealt with in the opinion of Kumaraswami Sastri, J. The fact that, when the attached property has been sold in execution, the other decree-holders are now expressly empowered to apply to set aside the sale under Order 21 Rule 90, a point on which there was a conflict of opinion under the former S. 311, does not appear to me to affect the present question. A decree-holder who is entitled to share in the sale proceeds should obviously be regarded as interested in the sale.

For the reasons given, I would answer the question in the negative.

Ayling, J.

Ayling, J.—I agree.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J. :—The question referred to us for decision is "whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise, are entitled to question a private alienation made during the continuance of such attachment" and the answer turns on the scope and effect of the explanation added to S. 64 of the Civil Procedure Code of 1908 which runs as follows:—"For the purpose of this section claims enforceable under an attachment include claims for the rateable distribution of assets." The section otherwise reproduces S. 276 of the Code of Civil Procedure of 1882, which rendered private alienations of property after attachment void against all claims enforceable under it.

Under the Civil Procedure Code of 1859, S. 240 which is practically the same as S. 276 of the Acts of 1877 and

1. (1891) I. L. R. 16 Bom. 91. 2. (1903) I. L. R. 25 All. 431.

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1882 rendered private alienation subsequent to the attachment void. This section was construed by their Lordships of the Privy Council in *Anund Lal Doss* v. *Jallodhar Shaw* [1], to mean that the private alienation was only void in so far as it was necessary to secure the execution of the decree to the creditor who obtained the attachment and that the protection cannot be extended to all persons who at any future time might possibly obtain execution of their decrees. S. 276 of the Act X of 1877 which introduced the words "as against all claims enforceable under the attachment" was in recognition of the limitation imposed by Courts in India and the Privy Council on the general language used in S. 240 of the Act of 1859. Ss. 270 and 271 of the Act of 1859 gave priority to the first attaching creditor and provided for rateable distribution between other decree-holders who had taken out execution and not obtained satisfaction in so far as any surplus remained out of the sale proceeds.

The Acts of 1877 and 1882 took away the priority of the first attaching creditor and in place of Ss. 270 and 271 of the old Code enacted S. 295 which provided for rateable distribution between all decree-holders who prior to the realization of assets had applied to the Court for execution and had not obtained satisfaction.

Though the position of decree-holders who were entitled to rateable distribution in case the attachment culminated in a sale was fairly clear, questions arose as to what was to happen if there was a private alienation during the existence of an attachment which was put an end to either by satisfaction of the decree or was raised owing to other reasons. In *Ganga Din* v. *Khushali*, [2] the judgment-debtor sold attached property and paid off the decree-holder who attached it. Decree-holders who would have been entitled to rateable distribution if the attachment had not been put an end to objected to the removal of the attachment but their objection was overruled on the ground that their claims were not protected by S. 276 they having no right to anything till there was an actual sale and realization of assets, and applications for execution though entitling the decree-holder to rateable distribution under S. 295 were not equivalent to an attachment under S. 276. The same view was taken in *Manohar Das* v. *Ram Autar Pande* [3]. In *Umesh Chunder Roy* v. *Roy Bullabhi Sen* [4],

1. (1872) 14 M. I. A. 543.
2. (1885) I. L. R. 7 A. 702.
3. (1903) I. L. R. 25 A. 431
4. (1882) I.L. R 8 C. 279, page 281.

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where an alienation was made pending an attachment it was held that the attachment ceased on the decree being paid off and that the assignment was good against a subsequent attachment by the same party in execution of another decree.

In *Durga Churn Rai Chowdhry* v. *Mon Mohini Dasi* [1], it was held following *Ganga Din* v. *Kushali* [2] that a claim under S. 295 is not enforceable as an attachment against which an assignment is rendered void by the provisions of S. 276. Pigot and Rampini, JJ., after pointing out that the legislature had not provided that a petition under S. 295 shall have the same effect as an attachment observed as follows: "To hold that claims under S. 295 are claims enforceable by attachment against which assignments made under S. 276 are void, would perhaps be carrying out the intention of the legislature when S. 295 was introduced. Unfortunately, the Sections of the Code relating to execution were not recast so as to be fully adapted to the new state of things. S. 276 has not been successfully framed with the object of protecting rateable distribution amongst claimants under S. 295."

In *Kunhi Moosa* v. *Makki* [3] a kanom was executed pending an attachment and the decree in execution of which the property demised under the kanom was attached was paid off. It was held that the kanom was valid as against decree-holders who had applied for execution and who would in the ordinary course have been entitled to rateable distribution if the property had been sold. Subramania Iyer, J., was of opinion that the attachment ceased to be operative in so far as the attaching creditor was concerned on the decree amount due to him being paid off and that "on principle it follows that with reference to the other judgment-creditors also, who, had the attachment resulted in the realization of assets, would have been entitled to a rateable distribution, the attachment became inoperative". In *Vibudhapriya Tirthaswami* v. *Yusuf Sahib*, [4] a similar view was taken. It was held by Sir Arnold White, C. J., and Davies, J., that the rights of decree-holders who had applied for execution of their decrees depended upon S. 295 and that unless the events upon the happening of which S. 295 would have come into operation, namely, the realization of assets by the Court, happened, they had

1. (1888) I. L. R. 15 C. 771. 2. (1885) I. L. R. 7 A. 702.
3. (1899) I. L. R. 23 M. 478=10 M. L. J. 98. 4. (1905) I. L. R. 28 M. 381.

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no claims enforceable under the attachment so as to attract the provisions of S. 276 to the alienations questioned. The further question as to whether the words "claims enforceable under the attachment" would include claims of judgment creditors other than the attaching creditor as was held in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another* [1] or only the claims of the attaching creditor as was held in *Manohar Das* v. *Ram Autar Pande* [2], was left undecided.

The decisions in Bombay have placed a more liberal interpretation on S. 276. In *Sorabji Edulji Warden* v. *Govind Ramji F. N. Wadia and another* [1] a more liberal interpretation was placed on the words "claims enforceable under the attachment" than was placed by the Allahabad and Calcutta High Courts. It was held that when a sum of money due to the judgment debtor was attached and he assigned his rights after attachment and other decree-holders subsequently attached the same sum they were entitled to rateable distribution of the sum paid into Court by the granishee as against the transferee from the judgment creditor prior to their attachment on the ground that their claims were claims enforceable under the attachment. Mr. Justice Telang in an elaborate judgment after a review of all the authorities on the point held that while realization of assets under S. 295 would protect decree-holders who had applied for execution even subsequent to the alienation their rights were dependent on realization and consequently would not prevail over the purchaser after attachment, if the attachment ceased to have effect owing to the satisfaction of the decree or other causes—the purchaser being perfectly safe in the latter case.

It was in this state of the authorities that the legislature enacted S. 64 of the present Code (Act V of 1908). An explanation was added to S. 64 to the effect that for the purposes of that section claims enforceable under the attachment included claims for rateable distribution. As pointed out in *Jetha Bhima and Co.* v. *Lady Janbai* [3], the effect of the explanation is to give legislative approval to the extended meaning given to the words "claims enforceable under the attachment" in I. L. R. 16 Bom. page 91. In this view a reference to the authorities as they stood prior to the passing of the new Act would be relevant. It will be useful to consider in this connection the other relevant provisions

1. (1891) I. L. R. 16 Bom. 91. 2. (1903) I. L. R. 25 All. 431.
3. (1912) I. L. R. 37 Bom. 138.

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of the Code. In S. 73 which corresponds to S. 295 of the Act of 1882 the words used are " where assets are held by a Court and more persons than one, have before the receipt of assets, made application" instead of, "whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court" in S. 295 of the old Code. In Order 21, Rule 55, which corresponds to S. 275 a clause is added providing that the attachment shall be deemed to be withdrawn and for notification of such withdrawal by proclamation at the place where the property is situate. The only amount to be paid in order to get the attachment withdrawn is the amount decreed with costs and all charges and expenses resulting from the attachment and clauses (*b*) and (*c*) only refer to satisfaction and reversal of the decree in execution of which the property is attached. Rule 57 which is new provides for the determination of the attachment if the execution application is dismissed owing to the decree-holder's default. Order 21, Rule 69, which corresponds to S. 291 of the Act of 1882 provides that the sale shall be stopped if before the lot is knocked down the debt and costs including the costs of sale are tendered to the officer conducting the sale or proof given that the amount has been paid into Court. Order 21, Rule 89, corresponding to S. 310-A, requires that only the amount specified in the proclamation of sale less any payment subsequently made should be paid into Court with 5 per cent. of the purchase money. Form 8 of Appendix E to the Code specifies the sum due and authorises attachment and directs the officer to hold the same until further order of the Court unless the amount specified is paid and similarly the prohibitory order specifies the amount for which the decree has been passed. Form 24 which relates to attachment of immoveable property under Order 21, Rule 54, also gives the amount of the decree in execution of which the attachment is made. It is clear from the rules and forms above referred to that the attachment ceases to have any force as soon as the decree in execution of which the property has been attached is satisfied or the execution application is dismissed owing to the decree-holder's default. It is significant that the last clause of Order 21, Rule 55 and the whole of Rule 57 are new and that no reference is made to the claims of persons who would be entitled to reteable distribution. In contrast with this R. 90 which relates to the setting aside of sales for irregularity which corresponds to S. 311 of the old Code contains the words "entitled to share

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in a rateable distribution of assets " not found in S. 311. Reference was made in the course of argument to *Lakshmi* v. *Kuttunni*, [1] *Athappa Chetti* v. *Ramakrishna Nayakan*, [2] *Chakrapani* v. *Dhanji*, [3] *Ayodhya* v. *Nani*, [4] which decided that the term decree-holder included a person entitled to rateable distribution for the purpose of S. 311 and R. 90 has incorporated the result of the decisions. If the legislature intended the attachment to enure for the benefit of all persons entitled to rateable distribution it would similarly have declared that the attachment should cease only on all their claims being satisfied or that the cesser of the attachment should be without prejudice to their rights. That the difficulty created by rules 55 and 57 of Order 21 is real will be clear from the fact that the existence of a valid attachment is necessary in order to bring the property to sale and if the attachment ceases when the decree-holder who attaches is paid off a re-attachment will be necessary which will be of no avail if it is subsequent to the alienation. See *Gobind Singh* v. *Zalim Singh*, [5] and *Mina Kumari Bibi* v. *Bejoy Singh Dudhuria*, [6]. In order to get over this difficulty we shall have to read into all the rules in Order 21 relating to the raising of the attachment and in R. 89 the words "the amount due to decree-holders who would be entitled to rateable distribution prior to the private alienation." It is difficult to see under what rules of construction such a wholesale addition to the rules can be made.

It is contended for the appellant with some force that S. 64 enacts that the alienation pending attachment shall be void as against all claims for rateable distribution of assets, that claims for rateable distribution are not dependent on the attachment but on S. 73, that the claim for rateable distribution would have been enforceable if the properties had been allowed to be sold, that the legislature in enacting the explanation to S. 64 intended to make an attachment by one decree holder to enure for the benefit of all persons entitled to rateable distribution (the policy of the law being to prevent multiplicity of attachments), that the decree-holder who actually attaches and who under the law would have no priority in case the assets were realised by sale ought not to be allowed to defeat the rights of the other decree-holders and that

1. (1886) I. L. R 10 M. 57.
2. (1897) I. L. R. 21 M. 51.
3. (1900) I. L. R. 24 M. 311.
4. I. L. R. 15 A. 318.
5. (1883) I. L. R. 6 All. 33.
6. (1916) I. L. R. 44 Cal. 662=32 M. L. J. 425.

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by sanctioning the alienations of the property behind their back and paying off the attaching creditor he will virtually get priority. It is also contended that though under Rules 55, 57 the attachment ceases on payment of the decree-debt of the attaching creditor yet a fresh attachment by those entitled to rateable distribution should be treated as a continuation of the original attachment and that in any event Section 64 should be read as making the alienation void as against subsequent attachment by those who would if the execution have been allowed to proceed would have been entitled to rateable distribution.

It has been argued for the respondent that the explanation added to S. 64 only protects "claims for rateable distribution" that such claims can only arise when assets are held by a Court under S. 73, that the explanation was merely the legislative recognition of the principle enunciated by the Bombay High Court in *Sorabji Edulji Warden* v. *Govind Ramji F. N. Wadia and another* [1], and that the decision of their Lordships of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* [2] is conclusive on the matter.

The decision of the question which is not free from difficulty is in my opinion partly concluded by the observation of their Lordships of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* [2]. Though S. 276 of the old Code did not contain any provision corresponding to the explanation, the effect of the ruling in *Sorabji Edulji Warden* v. *Govind Ramji F. N. Wadia and another* [1] was to read the section in the same way as it would have read if the explanations were there and it is difficult to explain away the clear remark of their Lordships (who assume for the purposes of the argument that the decision in I. L. R. 16 Bom. 81 is correct) as having reference only to the wording of the old Code. In that case a decree-holder held two decrees against the same person and attached certain properties in execution of one of his decrees and would have been entitled to rateable distribution if the attachment had resulted in a sale. Pending attachment the judgment-debtor sold the property. The attachment subsequently ceased to be operative and the decree-holder subsequently attached the property and brought it to sale. The purchaser sought to recover the property from the alienees from the judgment-debtor. A decree was passed in his

1. (1891) I. L. R. 16 B 91. 2. (1916) I. L. R. 44 C. 662=32 M. L. J. 425.

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favour by the High Court but it was reversed on appeal by the Privy Council on the ground that the sale in execution being under an attachment subsequent to the private alienation was not protected by S. 276. Dealing with the argument that S. 276 rendered the alienation void as against the subsequent attachment their Lordships observe: "That section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. *Ex hypothesi* the alienation to the plaintiff was not during the continuance of the attachment in execution case No. 16 of 1907 or in other words the attachment under which the execution sale to the decree-holders was made. Therefore it cannot be avoided by the attachment."

It was also urged before their Lordships that having regard to the decision of the Bombay High Court in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia and another* the decree-holder was a person who would have been entitled to rateable distribution and was consequently protected against the private alienation. Their Lordships dispose of the argument with the following observations :—"He relies on section 295 of the Code of Civil Procedure as entitling him to the benefit of section 276 and for this purpose he calls in aid the application for attachment in execution case No. 8 of 1902. To bring section 295 into play certain conditions are necessary and one of them is that there should be assets held by the Court. It has not been shown that there was such assets and the indications in the record point the other way. But apart from this section 295 cannot help the decree-holder. Though the word 'attachment' occurs three times in section 276 the reference is to one and only one attachment; and that one in this case is the attachment in Execution Case No. 16 of 1907. All that can be done is to employ that attachment for the purpose of impugning the private alienation for it is on that alone that the decree-holder's title to the property in the suit at present rests. So that even if it be assumed for the sake of argument that the view which prevailed in *Sorabji Edulji Warden* v. *Govind Ramji* [1] is correct and that the conditions of Section 295 have been satisfied it cannot advance the decree-holder's case."

There can be little doubt that Section 64 as it stands at present can protect decree-holders entitled to rateable distribution

1. (1891) I. L. R. 16 B. 91.

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against private alienation, only where assets have been realised in which case they will be entitled to share the proceeds in preference to the alienee. This can happen only in a very limited class of cases *e.g.*, where the garnishee pays the attached amount into Court. In the numerous and important class of cases relating to attachment of immoveable property the amendment would be of no use to decree-holders entitled to rateable distribution. Assuming that the legislature intended the attachment under Section 64 to enure for the benefit of all persons entitled to rateable distribution who had applied for execution prior to the private alienation it has not gone far enough when it introduced the explanation to Section 64 worded as it is and made no provision for the continuance of the attachment in Order 21 in cases where the attaching creditor was paid off. The result is not very happy, but the remedy is in the hands of the legislature.

I agree with the view expressed by Seshagiri Aiyar, J., and would answer this reference in the negative.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE AYLING, AND MR. JUSTICE KUMARASWAMI SASTRI.

Tenjerla Suryanarayana ... *Appellant.** (*Defendant*)

v.

Prabhala Subbayya ... *Respondent* (*Plaintiff*).

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Suryanarayana v. Subbayya.

Contract Act. S. 23—Illegality—Agreement by a client to pay a sum of money to a pleader's Clerk for special attention to his case—Agreement opposed to public policy—Void.

An agreement by which a litigant binds himself to pay a sum of money to his Vakil's Clerk for giving special attention to his legal business is opposed to public policy and consequently cannot be enforced.

Appeal under Clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Oldfield in Letters Patent Appeal No. 167 of 1916 preferred against the judgment of the Honourable Mr. Justice Napier in Civil Revision Petition No. 346 of 1915 praying the High Court to revise the decree of the Court of the Principal District Munsif of Masulipatam is Small Cause Suit No. 2660 of 1914.

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* L. P. A. No. 36 of 1917. 16th October, 1917.

[The case came on for hearing in the first instance before Oldfield and Bakewell, JJ. who delivered the following Judgments.]

Oldfield, J:—The learned Judge has refused to enforce the contract sued on by plaintiff, Ex. A., on the ground that it is void as being against public policy. Such a decision can be justified, only if Ex. A offends against one of the heads of public policy, which has been recognised by authority. *Janson* v. *Driefontein Consolidated Mines Ltd.* [1]. It is not sufficient that the contract will or that such contracts may lead to undesirable results; and it is necessary to come to closer quarters with the question whether the mischief involved in the contract is such as authority has recognised than, with all respect, the learned Judge has done.

The translation of Ex. A printed in the record is confused, if not inaccurate. But reference to the vernacular shows that, having retained plaintiff's master, a Vakil, for execution proceedings, defendant in Ex. A agreed with plaintiff to pay him Rs. 20 in consideration of his causing the execution application etc., to be filed. It is further provided that defendant is to make all arrangements for service of notices, attachments etc., in the debtor's village, and is to pay the amount promised at the end of the proceedings without reference to his gaining or losing by them.

I read this as an agreement to pay plaintiff Rs. 20 for exerting himself especially in defendant's case; and I cannot agree with my learned brother that it is an undertaking to carry on the execution or to do Vakil's work, such as only a vakil could give. It therefore does not in my opinion offend against S. 10 of the Legal Practitioners Act. The apprehended infringement of S. 30 is too remote and conjectural for consideration.

It is then argued that Ex. A infringes public policy, because it is an agreement to give plaintiff, a secret profit, or what is practically indistinguishable, may place him in a position, in which his interest and his master's may conflict. As regards secret profit his master, as defendant's 1st witness, deposed that he himself received Re. 1 as voluntary remuneration, on plaintiff's account and that he never objected to any extra remuneration being paid to his clerk after payment of his own fees. It is then difficult to see how defendant can allege that a fraud on the master was committed, when the latter disclaims any grievance. And secondly no case has been shown us, in which an agreement involving the receipt of a secret profit was held void on that account or was held to entail more than the master's right to an account of that profit, when it had been received. Cases, such as *Sitarampur Coal Company Limited* v. *J. H. Colley* [2] and the cases overruled in

1. L. R. (1902) A. C. 484. 2. (1908) 13 C. W. N. 59.

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Bhagwan Dei v. *Murari Lal*[1] must be distinguished, because they turned on the duty of public servants, regulated or unregulated by rules for their conduct, and it has not been shown how Vakils' clerks are in a similar position. As regards conflict of interest it is not necessary to say more than that none is shown to have actually arisen or to have been probable, and that none can be presumed.

It is then argued that Ex. A represented an agreement to prevent the course of justice, because plaintiff was to apply for execution against an exonerated defendant. The answer is that this is not stipulated for in Ex. A and that I understand the Lower Court not to have accepted defendant's oral evidence on this point.

These are all the arguments advanced, based on public policy. It was however attempted to support the learned Judge's decision on the ground that Ex. A had no consideration, relying on the decision in *Ramachandra Chintaman* v. *Kahi Raju*[2]. It must be distinguished because in it the agreement sued on had been preceded by another implied in the engagement of the plaintiff, under which he had already promised to use all his skill and resources on the defendant's behalf. He therefore could have no further consideration to offer, when by the second agreement he again made in effect the same promise. In the present case there is no such averment of an agreement previous to that sued on and none was pleaded. It would not be fair, even if it were possible, in the circumstances to allow defendant to rely on the acceptance by plaintiff of the (Re. 1) voluntary fee as constituting one.

The undesirability of such contracts as Ex. A is obvious; but they must be prevented by enforcing control over Vakils' Gumastas in other ways. I would allow the Letters Patent Appeal and restore the decision of the learned District Munsif with costs throughout.

Bakewell, J.

Bakewell, J.:—Under S. 10 of the Legal Practitioners Act, 1879 no person shall practise as a pleader unless he holds a certificate and has been enrolled. Under S. 28 no agreement by a pleader is valid unless in writing and filed in court, and under S. 30 such an agreement excludes any further claim of the pleader. The agreement in this case is to pay a pleader's clerk "Rs. 20 as a reward for executing" a certain decree, by causing the warrant and other things to be filed, and doing the work in connection with the case: and it is in my opinion an agreement to take all necessary steps in the execution of the decree.

So far as it deals with steps to be taken in the court and its office the arrangement relates to work to be done by the pleader or by means of his clerk, and if the work were done by the clerk on his own account it would in my opinion amount to practising in the court. If the work were done by the clerk on behalf of his master the agreement would

1. (1916) 14 A. L. J. 962. 2. (1877) I. L. R. 2 B. 362.

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stipulate for a fee beyond that contained in the pleader's appointment. In either view the agreement is in my opinion within the mischief of the statute and is invalid. The agreement may possibly relate also to acts usually done out of court by the party himself but this part of it cannot be separated from the rest.

I would dismiss this appeal with costs.

By the Court:—The result is that the Letters Patent appeal is allowed and the decree of the District Munsif is restored with costs throughout.

P. Nagabushanam for Appellant.

V. Rama Doss for Respondent.

The Court delivered the following

The Chief Justice.

Judgments :—*The Chief Justice.*—The agreement in question is one by which a litigant binds himself to pay his Vakil's clerk Rs. 20 for giving special attention to legal business which the Vakil was bound to see to in consideration of his fee. The revised translation makes it clear that this is the scope of the agreement. The law has never allowed legal practitioners of any kind to enforce contracts with clients irrespectively of the consideration whether they conformed to public policy or not. Barristers cannot sue at all for their fees, and the fees which barrister's clerks receive by custom according to a fixed scale are mere gratuities and cannot be sued for though they are recognized on taxation, *Ex parte Cotton* [1]. Solicitors' charges are now the subject of legislative enactment in England resembling the provisions in the Legal Practitioners Act as to charging more than the regulation fees. But even before these enactments, such agreements were jealously scrutinized and required to conform to the dictates of public policy. In *Pomfret v. Murray* [2], speaking of a novel stipulation by an attorney who was also a trustee, Lord Hardwicke said, "This is a case of great consequence; and it is incumbent on the Court to proceed warily before they allow such a demand," an observation which appears to me to be peculiarly applicable to the present case. In *Saunderson* v. *Glass* [3], the same great Judge observed, "It is truly said at the bar, that a security obtained by an attorney, whilst he is doing business for his client, or whilst a cause is depending, appears to this Court in a quite different light than between two common persons; for

1. (1848) 9 Beav. 107. 2. (1740) 9 M. 281=88 E. R. 417.
3. (1742) 2 Atk. 296=26 E. R. 581.

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if an attorney, *pendente lite*, prevails upon a client to agree to an exorbitant reward, the Court will either set it aside entirely, or reduce it to the standard of those fees to which he is properly entitled;...............and if the Court did not observe such a rule, it would expose clients very much to the artifices." See also *Drax* v. *Scroope* [1], and *Philby* v. *Hazle* [2], where Erle, C. J., and Wiliams and Byles, JJ., all speak of agreements by solicitors of the kind there in question as being in the words of Williams, J., manifestly "contrary to the general policy of the law". It is clear then that we shall be introducing no new law if we apply the test of public policy to agreements of the character now sued on. We have not been referred to any case in England in which a solicitor's clerk has stipulated with his employer's client for remuneration for giving special attention to his business. Such conduct might very possibly afford good ground for his immediate dismissal, and the fact that in this case the Vakil does not object to his clerk's adopting this course in this and other cases, far from making the case any better, opens out a fresh vista of undesirable possibilities,' and only makes it the more incumbent on us to interfere for the protection of clients by refusing to enforce such agreements as contrary to public policy. I would allow the appeal and dismiss the suit with costs throughout.

Ayling, J.—I concur.

Kumaraswami Sastri, J.—I agree.

C. A. S.

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1. (1831) 2 B. and Ad. 581=109 E. R. 1259. 2. (1860) 8 C. B. N. S. 647.

IN THE HIGH COURT OF JUDICATUE AT MADRAS.

[FULL BENCH].

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE AYLING, AND MR. JUSTICE KUMARASWAMI SASTRI.

S. Vullappa and others ... *Accused in Calendar Case No. 469 of 1916 on the file of the Stationary Sub-Magistrate of Kadiri.**

v.

S. Bheema Row ... *Complainant in do.*

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Penal Code, Ss. 441 and 448—Trespass by person with knowledge that his act is likely to cause annoyance or insult but without any intention to intimidate insult or annoy the person in possession—Act, if an offence.

A person who enters into property in possession of another or remains there with an intent other than to intimidate, insult or annoy him or to commit, an offence, but with the knowledge that his act is likely or certain to cause annoyance or insult to the person in possession, is not guilty of an offence under S. 448 of the Indian Penal Code.

Per *Ayling, J*:—A mere knowledge that the trespass is likely to cause insult or annoyance to the owner of the property does not amount to an intent, to insult or annoy within the meaning of S. 441, I. P. C. but where the trespasser knows that his trespass is practically certain in the natural course of events to cause insult or annoyance to the owner of the property, it is open to the court to infer an intent to insult or annoy. It is a question of fact whether this presumption of intent is displaced by proof of any independent object of the trespass.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code, by the Sessions Judge of Bellary in his letter, dated the 20th March 1917.

The Court (Abdur Rahim and Oldfield, JJ.) made the folowing

Abdur Rahim, J.

Order:—*Abdur Rahim, J*:—The second accused's son, a young boy having stolen some jewels belonging to his father told him that he had given them to the Head Master of his school, the complainant, who kept them in a box in his house. Thereupon the second accused with his friends the other four accused in the case went into the complainant's house, and in spite of the latter's protest and remonstrances insisted on searching, and did in fact search the house. But nothing was found. The complainant naturally felt insulted and annoyed at the high-handed conduct of the accused and lodged a complaint before the Magistrate. The trial Magistrate found that the accused knew that the consequences of their action would be to annoy or insult the

* Crl. R. C. No. 194 of 1917 (Case Ref. No. 28 of 1917). 9th November, 1917.

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complainant. The appellate Magistrate being of opinion that that finding was not sufficient to bring the case within S. 448, I. P. C. as the primary intention of the accused was not to insult or annoy the complainant, set aside the conviction and sentence. The Sessions Judge wants us to revise the case for he says "the accused pushed their way into the complainant's house notwithstanding his remonstrances and must have known that they were annoying the complainant by so doing and consequently must be deemed to have intended the ordinary consequences of their act."

The finding to my mind amounts to this: the accused went into the complainant's house with the intent to search for the jewels and they must be taken to have known that the search would annoy the complainant. Is that sufficient to make out a case under S. 441, Indian Penal Code? I think not. The accused when insisting on searching the house had a known intent and that was to recover the jewels. It may be that at the same time they did not mind or care that their act would annoy the complainant; but they certainly did not enter into the complainant's house or remain there with the object of annoying the complainant. If it was found or could fairly be inferred that the accused had in addition to their intention to recover the jewels a further intent, namely, to insult or annoy the complainant, S. 441, Indian Penal Code, would apply (see the criticism of 6 Madras High Court Rulings (Appx.) 25 in Ss. 577 and 578 of Mayne's Criminal Law 3rd Edition). But that is not the case here. The framers of the Indian Penal Code have throughout borne in mind the distinction between the 'intention' or 'intent,' of a person and his knowledge that a certain result is likely to follow from his act; see for instance Ss. 295, 299 and 304. There is a conflict of authority on the question, but the preponderance of authority seems to be in support of the view I have suggested: Vide I Weir (4th Edition) pages 518 and 524, *In the matter of Jotharam Davay* [1], *Queen Empress* v *Rayapadayachi*, [2], and *Manikka Veera Raghava Chariar* v. *Emperor* [3], opinion of Sankaran Nair, J. in *Sellamuthu Servaigaran* v. *Pallamuthu Karuppan* [4], a decision of myself sitting alone in *Chinna Krishna Reddi* v. *Marri Poliah* [5], *Chunder Narain's Case* [6], *Chandi Persad* v. *Evans* [7], *In the matter of*

1. (1878) I. L. R 2 M 30.
2. (1896) I. L. R. 19 M. 240.
3. (1910) 8 M. L. T. 246.
4. (1911) I. L. R. 35 M. 186.
5. (1912) M. W. N. 395.
6. (1879) I. L. R. 4 C. 837.
7. (1894) I. L R. 22 C. 123.

Govind Prasad [1] and *Emperor* v. *Gaya Bhar* [2] while a different view has been expressed by Benson, J, in *Sellamuthu Servaigaran* v. *Pallamuthu Karuppan* [3] followed by Sadasiva Aiyar J., in *Somadurai Mudaliar* v. *Emperor* 9 Criminal Law Review, 196 ; and also *Emperor* v. *Lakshman* [4]. I would therefore refer the following question to the Full Bench :—

"If a person enters into property in possession of another or remains there with an intent other than to intimidate, insult or annoy him or to commit any offence, but with the knowledge that his act is likely or certain to cause annoyance or insult to the person in possession, is he guilty of an offence under S. 418 of the Indian Penal Code?"

Oldfield, J

Oldfield, J:—I take the facts as stated by my learned brother, that accused entered and remained on complainant's premises with the primary intention to recover their property, which they wrongly thought was there, and with knowledge of the probability, so strong that according to ordinary standards it amounted to certainty, that their conduct would cause annoyance. The 1st Class Deputy Magistrate has held and it is argued here that no offence was committed because their primary intention was to recover their property.

This conclusion was based on *Queen Empress* v. *Rayapadayachi* [5]. But it involves the further assumption, which we have been asked explicity to make, that S. 441, Indian Penal Code is not worded so as to include an act done with knowledge of the probability of any particular consequence and that such knowledge whatever the degree of probability in question, is not to be taken into account in deciding whether an offence has been committed. My learned brother has referred to authorities as justifying this assumption. But of the cases from the authorized reports, with which alone I feel bound to deal, some do not, with all respect, do so. In *Jotharam Davey's* case [6] and *Chandi Persad* v. *Evans* [7], the accused were doing what was and what they believed in good faith to be a lawful thing in a lawful way and in the absence of any finding of an intent to annoy or any probability that the complainants, presumably law abiding persons, would suffer legitimate annoyance, no presumption that they

1. (1879) I. L. R. 2 A. 465.
2. (1916) I L R. 38 A 517.
3. (1911) I. L. R. 35 M 186.
4 (1902) I. L. R. 26 B 558.
5. (1896) I. L. R. 19 M. 240.
6 (1878) I. L. R. 2 M. 30.
7. (1894) I. L. R. 22 C. 128.

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would be annoyed could arise. Similarly in *Govind Prasad's* case [1], except that there was no finding on the immaterial point, whether the act of the accused was in fact lawful. And, to contrast these two cases with that before us, in both of them accused acted in good faith, whilst here they must have known that their conduct was against the law. In *Queen Empress* v. *Rayapadayachi* [2], and *Emperor* v. *Gaya Bhar* [3] the existence of an intent to annoy was directly negatived in the first case at least by accused's precautions against discovery; and in both the ground of decision was the distinction "between entertaining a certain intention and having the knowledge that one's act may possibly," not may probably or, as my learned brother apparently would hold will certainly "lead to a certain result." *Chunder Narain's* case [4] is of little weight since the point is not discussed at length. Lastly the judgment of Sankaran Nair, J. in *Sellamuthu Servaigaran* v. *Pallamuttu Karuppan* [5] no doubt supports the contention under discussion. But it is in conflict with the view taken by Benson, J. in the same case and with *Emperor* v. *Lakshman* [6] and *Premanundoo Shaha* v. *Brindabun Chung* [7].

The opinion of Benson, J. is, it may be respectfully suggested, in accordance with general principles. It is true that the Penal Code distinguishes, when it is necessary to do so, between intention and knowledge and does not treat the one as invariable accompaniment of the other. But it is only necessary to compare sections 299 and 304 (3) and (4) in order to see that knowledge of a probability is treated as equivalent to intention, when the probability is of more than a particulur strength; that is when the consequence, on which the character of the act in question depends is known to be that, which will follow in the natural course. This seems to me consistent with the decision in *Queen Empress* v. *Rayapadayachi* [2], and other similar cases, in which the annoyance alleged to be the consequence of the accused's act was, owing to precautions taken by him, or for other reasons, regarded as no more than possible. Here however the accused must, as persons of ordinary sense, have known that their conduct would in the natural course cause legitimate annoyance

1. (1879) I. L. R. 2 A. 465.
2. (1896) I. L. R. 19 M. 240.
3. (1916) I. L. R. 38 A. 517.
4. (1879) I. L. R. 4 C. 837.
5. (1911) I. L. R. 35 M. 186.
6. (1902) I. L. R. 26 B. 558.
7. (1895) I. L. R. 22 C. 994.

inevitably; and I would therefore hold that annoyance was their intention. I add that the contrary view would make any immediate intention, which the accused might allege as entertained, whether or no in good faith, the measure of their responsibility and authorize an unlimited extension of the right of self-help, which would be disastrous to security.

With these observations I concur in the reference proposed by my learned brother and with the form, in which he has framed the question to be referred, on the understanding that the intent referred to in it is the primary or immediate one, which the accused may entertain.

K. Koti Reddi for the accused.

Public Prosecutor for the crown.

Dr. S. Swaminadhan for the complainant.

The Court expressed the following

Opinion:—*The Chief Justice*:—The question in this case is, what is the meaning of "with intent to annoy" in S. 411 of the Indian Penal Code. In his History of the Criminal Law, Vol. II, p. 100 Sir James Stephen gives the following definition of intention: "The direction of conduct towards the object chosen is called the intention or aim (for the metaphor involved in the word is obviously taken from aiming with a bow and arrow)." and he distinguishes the aim or intention of an act from the motive or reason which actuated the person doing it. At the same time he admits (page 110) that intention is frequently used and understood as being synonymous with motive, and speaks of "two common fallacies, namely, the confusion between motive and intention, and the tendency to deny an immediate intention because of the existence real or supposed of some ulterior intention. For instance, it will often be argued that a person ought to be acquitted of wounding a police man with intent to do him grievous bodily harm, because his intention was not to hurt the police-man but only to escape from his pursuit. This particular argument was so common that to inflict grievous bodily harm with intent to resist lawful apprehension is now a specific statutory offence." That is to say, the legislature in England has now solved the difficulty by making the intent to resist lawful apprehension the gist of the offence. If we are to apply these tests to the present case, there can be no doubt that the accused must be taken to have intended to annoy the complainant when he trespassed on his house in spite of his protests even though his ulterior intention was to search for his

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own jewels which he believed to be hidden there. On the other hand it is clear that this was not the view of the meaning of 'intent' taken by Macaulay and the other Indian Law Commissioners in the draft Penal Code. They regarded the maxim that every one must be taken to intend the natural consequences of his acts as a fiction which should not be recognised in the Penal Code. Their treatment of this question elicited many criticisms which were met in paragraph 100 of the first report on the Penal Code by the Indian Law Commissioners. "The Commissioners saw clearly the difference between "intent" and "knowledge of likelihood," and meant to express it distinctly in order to avoid the necessity of fiction in laying charge as for example by imputing "intent" constructively when the circumstances imply only "a knowledge of likelihood" advisedly intending as they did that there should be no distinction in general, in respect of penal consequences between cases in which a man causes an effect which is an offence designedly, and cases in which he causes it by doing what "he knows is likely to cause it." Advisedly intending this in general they worded the enactment so that the charge may be always expressed according to the truth." (The Indian Penal Code as originally framed:—Madras Higginbotham & Co., p. 215).

Their view was in the language of the Commissioners that there should in general be no distinction in respect of penal consequences between cases in which a man causes an effect which is an offence designedly and cases in which he causes it by doing what he knows is likely to cause it, but that it should expressly be made punishable to do the act with knowledge of the likelihood as they call it. An examination of the Indian Penal Code as finally passed into law shows that it was framed on these lines. The maxim that every one must be taken to intend the natural consequences of his acts is incorporated in the definition of "voluntarily" in S. 39, and thus made applicable in every section where that word is used. More generally doing the act with a criminal knowledge or a criminal intent is expressly made punishable. S. 39 speaks of "an act which is criminal only by reason of its being done with a criminal knowledge or intention" and the distinction is observed in Ss. 87 to 89, 166 and 167, 194, 295, 297, 299, 350, 366, 367, 425, 499, 504 and 505, in all of which doing the act with intent and doing the act with a knowledge of the consequences are both made punishable. The same result is

effected by the addition of the explanation to S. 188. In S. 350 in particular it is made punishable to use force "intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury fear or annoyance to the person to whom the force is used." The contrast with the language of S. 441 is very suggestive.

In these circumstances, when in the isolated S. 441 doing the act with the specified intent is alone made punishable, the inference appears to be that the legislature did not intend that in this section doing the act with a knowledge of its consequences should be punishable. The only other section resembling this which I have noted on a cursory examination of the Code is S. 201, and the omission as regards S. 441 may be explained by the fact that trespassing with intent to annoy was a new offence unknown in English Law. This is the view on which *Queen Empress* v. *Rayapadayachi*, [1] was decided and I think it should be followed in preference to *Emperor* v. *Lakshman*, [2] and the judgment of Benson, J. in *Sellamuthu Servaigaran* v. *Pallamuthu Karuppan*, [3].

I will only add that the decision in my opinion does not involve any risk to the public security. A man who forces his way into another's house against his will commits a civil trespass for which he may be made answerable in substantial damages. Further, the owner of the house may obstruct his entry, and even I think, use reasonable force to remove him without committing the offence of wrongful restraint punishable under S. 341, and any active resistence to such obstruction would amount to the use of criminal force punishable under S. 350 as under that section it is sufficient if the accused knows that the use of such force is likely to cause annoyance to the person to whom it is used and any preparation for the use of such force will constitute an assault punishable under S. 351. I would answer the question in the negative. It must of course be a question of fact in each case whether the intent was to annoy or not.

Ayling, J.

Ayling, J. :—With all respect, I find it impossible to answer the question referred to us with a simple affirmative or negative. That a mere knowledge that the entry is likely to cause insult or annoyance cannot be taken to be equivalent to an intent to insult

1. (1896) I. L. R. 19 M. 240. 2. (1902) I. L. R. 26 B. 558.
3. (1911) I. L. R. 35 M. 186.

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or annoy must, I think, be conceded: A comparison of S. 441, I. P. C. with the other sections of the code referred to by the learned Chief Justice makes this clear. Where the legislature has in so many instances specifically placed a knowledge that a certain result is likely to follow from the act on the same footing as an intent to cause that result, it can hardly be contended that the two are synonymous.

On the other hand it seems to me necessary to bear in mind that a person's object (to use a non-contentious word) in entering on another person's property may be two-fold: and that, while intent must in most cases be a matter of inference, there are degrees of probability ranging up to practical certainty, from the stronger of which an inference of intent may not improperly be drawn (*Vide* the distinction emphasised in *Emperor* v. *Lakshman* [1].) The reference deals with *certainty* as well as *likelihood* of causing annoyance.

The practical difficulty however seems to me to lie less in the degrees that intervene between likelihood and certainty than in the question of the extent to which one motive displaces another or should be treated to the exclusion of another as influencing a man's act.

Suppose A enters the dining room of B, a total stranger, during a dinner party. Annoyance to B is so certain that in the absence of special circumstances or any evidence tending to suggest an independent motive for the intrusion, a Court might, I think, fairly infer that A's intent was to annoy B and nothing else.

Now suppose it is shown that A, on entering meant

1. to convey warning to one of B's guests in a matter of life and death.

2. to gratify his curiosity by looking at a picture in B's dining room.

Is A's action to be treated as equally criminal or non-criminal in each of these cases?

I think not: and it seems to me that in every such case, where a specific intent other than one to insult or annoy is set up, the Court must determine whether the motive involved in it is sufficiently strong to displace the intent of annoyance which would otherwise be inferred. The existence of an independent

1. (1902) I. L. R. 26 Bom. 558.

motive for the entry does not in all cases preclude the consideration of an intent to annoy inferable from the practical certainty that annoyance would be caused.

In case 1, I should hold that the intruder's intent (in the sense contemplated by S. 441, I. P. C.,) is not to annoy and that he has committed no offence.

The principle of S. 81, I. P. C., might be applied and it might be held that the danger to be averted by the warning far outweighed the annoyance caused to the owner of the house: or it might be held that the urgency of the matter precluded the intruder from realising, as he must be presumed to do in ordinary circumstances, the certainty of annoyance.

In case 2, the motive put forward by the intruder is so trivial, that neither line of reasoning can be adopted. In effect it is as if he said to the owner of the house, "I know my entry will annoy you, but I want to see your picture, and I mean to do so even at the cost of annoying you, I don't wish to annoy you, but I propose to gratify my curiosity whether I annoy you or not."

In this case, I do not think the intent inferable from the known certainty of annoyance is displaced by the trivial intent set up by the intruder; and I should be inclined to hold that the offence of criminal trespass had been committed.

If it be held otherwise it would follow that against such an entry there would be no right of private defence. For the trespass would not be criminal, and S. 97, I. P. C., only gives a right of private defence of property against a *criminal* trespass. It is true that this difficulty is to some extent modified as pointed out in the concluding portions of the judgment of the learned Chief Justice, which I have had the advantage of perusing. Obstruction of an intruder's entry would doubtless not amount to wrongful restraint under S. 341, I. P. C., and might be resorted to by the owner or occupier without infringement of the law. But I am not clear how far his rights would extend against an intruder who had already effected his entry; or whether he would be legally justified in using reasonable force to expel him. I cannot therefore altogether dismiss this aspect of the case, in endeavouring to ascertain the intention of the Legislature in regard to S. 441 I. P. C. If my reading of the latter is incorrect, it seems worthy of consideration whether S. 97, I. P. C., does not need amendment. I would therefore answer the reference as follows :—

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A mere knowledge that the trespass is likely to cause insult or annoyance to the owner of the property does not amount to an intent, to insult or annoy within the meaning of S. 441, I. P. C: but where the trespasser knows that his trespass is practically certain in the natural course of events to cause insult or annoyance to the owner of the property, it is open to the Court to infer an intent to insult or annoy. It is a question of fact whether this presumption of intent is displaced by proof of any independent object of the trespass.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J. :—The question referred to us for decision is whether knowledge that his act is likely or certain to cause annoyance or insult to the person in possession, would if his intention was other than one to intimidate insult or annoy render him guilty of an offence under S. 448 of the Indian Penal Code.

Though there is a conflict of decisions on the question the preponderance of authority is in favour of the view taken by Abdur Rahim, J., one of the referring Judges that it is not sufficient to prove that the person charged under S. 448 must have known or had reason to believe that his act would cause insult or annoyance to the person in possession. The question is not free from difficulty but I am of opinion that the reference should be answered in the negative.

It is clear from a perusal of the various sections of the Indian Penal Code that a difference is drawn between "intention" and "knowledge of consequences" and that the Code takes notice of actual and not presumed intention in determining criminality though in determining what a man's actual intention was, Courts can raise all fair inferences that can be drawn from his acts. When an act is made an offence by reason of its having been committed with a specified intention the intention has to be found as a matter of fact upon evidence which justifies the inference that the accused had the intention required to render his action criminal.

When proof of intention is necessary it is clear that unless the accused admits that his intention was such as would render him guilty of the offence charged—intention which is a psychological fact—can only be proved by having regard to the nature of the act he commits and a criminal intent is often presumed form acts which are reasonably susceptible of but one interpretation. The rule of law that a man must be taken to

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intend the natural consequences of his act is really a rule of evidence. The Court is not bound to accept the statement of the accused as to his intention but may find from the facts what his intention was and in order to arrive at a conclusion may hold that when a man uses means which at the time he used them he knew or had reason to believe to be likely to cause a result his intention was to cause the result.

When however the Court on the materials before it comes to the conclusion that a person had a specified intention when he did an act which is not the intention required to make his act an offence under S. 441 the mere fact that he would have known that certain consequences would happen if he had paused to consider would in my opinion be insufficient.

The view taken by the framers of the Act has been pointed out by the Chief Justice in his judgment and I think that in construing S. 441 it must not be forgotten that wherever the Penal Code wants to make a man liable for knowledge of consequences it expressly says so. As pointed out by Sir William Markby (Elements of Law, paragraph 222) expectation that a consequence would follow or a knowledge that it is likey to follow without any desire that it should follow is an attitude of mind which is distinct from intention and the framers of the Act clearly kept the two distinct and treat knowledge as a state of mind differing from intention. In some sections, *e.g.*, 118 to 120, 153, 154, 217, 293 etc., the words used are 'Intending or knowing it to be likely'. In others only intention is referred to *e. g.*, 124, 140, 174 to 176, 193, 211, 509 etc. In some sections the word used is "knows" *e. g.*, 127, 130, 188, 196, 260 etc. In some sections the words are knowing or having reason to believe or believing, *e.g.*, 136, 181 to 183, 201 to 203, 499 etc. In certain sections the words are 'reason to be believed' *e. g.*, 155, 156 and in others " for the purpose of" *e. g.*, 189, 190. In S. 298 the words used are " deliberate intention."

I think the correct view has been taken in *Queen Empress* v. *Rayapadayachi* [1]. Though the facts show that the accused wanted to conceal his presence in the house the judgment proceeds on the broad ground that " S. 441 is so worded as to show that the act must be done with intent and does not as other sections do (*e. g.*, S. 425) embrace the case of an act done with knowledge of

1. (1896) I. L. R. 19 M. 240.

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of the likelihood of a given consequence." To introduce the rule that knowledge of consequences is equivalent to an intention when the probability of consequences following is of more than a particular strength would, in my opinion, introduce, into the section, which, as pointed out by Straight, J., *in the matter of Gobind Prasad* [1] is complicated enough, further difficulties.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER AND MR. JUSTICE SESHAGIRI AIYAR.

S. A. No. 275 of 1917.

Sankaramahalingam Chetti and another ... *Appellants** (*Defendants, 1 and 3*).

v.

Muthulakshmi and another ... *Respondents (Plaintiff and 2nd Defendant).*

Sankaramahalingam Chetti v Muthulakshmi

C P.C.—S. 11—Res Judicata between co-defendants-Conditions of applicability of doctrine—Decree in spite of a finding—Finding if and when res-judicata—Unnecessary finding when res judicata—Evidence Act, S 115.—Estoppel—A unnecessarily made party to suit—A insisting on continuing on record and raising pleas as against co-defendant—Co defendant praying for A's removal from record on ground of being unnecessary party—Court not removing him and deciding issues as between them after taking evidence—A not estopped from pleading incorrectness of decision in subsequent suit between himself and his co-defendant.

In a suit by A against her brother and brother's sons for the recovery of certain immoveable property to which she claimed title under deeds of sale and gift from her father, the question arose whether the defendants were precluded by reason of the decision in a prior suit (O.S. 232 of 1910) from raising the pleas that the deeds relied upon by A represented only sham transactions and that they (defendants) had a good title by adverse possession for the statutory period O. S. 232 of 1910 was a suit for sale upon a mortgage bond executed by A and was brought against A and her brother and brother's sons. In that suit A contended that the bond sued on represented a sham transaction devoid of consideration and that her brother and brother's sons were unnecessary parties inasmuch as they claimed under a title adverse to herself and the mortgagee. Her brother and brother's sons however insisted on continuing on the record and raised the same pleas as those raised by them in the subsequent suit The courts found that the mortgage bond sued upon represented a sham transaction, that the deeds of sale and gift relied upon by A represented real transactions and that A's brother and brother's sons had not a good title by adverse possession for the statutory period; they accordingly dismissed the suit.

Held, (1) that the findings in O. S. 232 of 1910, that the deeds relied upon by A represented real transactions and that her brother and brother's sons had not

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* S. A. Nos. 275 and 276 of 1917. 14th August, 1917.

1. (1879) I. L. R. 2 A. 465.

acquired title by adverse possession were not *res-judicata* inasmuch as, in view of the finding as to the bond sued on, the suit would have been dismissed even if the findings on the other issues had been the other way ; and (2) that the defendants were not estopped from saying that the decision in the prior suit on the points at issue was wrong by reason of their having in that suit invited a decision upon them, and the mere fact that A was led to adduce evidence in the former case to substantiate her position was not enough to show that she was prejudiced or induced to change her position by the defendant's inconsistent conduct within the meaning of S. 115 of the Evidence Act.

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Per Spencer and Seshagiri Aiyar, JJ. :—For the decision in a suit to operate as *res judicata* between co-defendants therein, it is necessary (1) that there should be active controversy between the co-defendants and (2) that an adjudication *inter se* between the co-defendants should be necessary to give the appropriate relief to the plaintiff.

Per Seshagiri Aiyar, J. :—*Quaere* whether, in order that the decision in a suit may operate as *res-judicata* between co-defendants therein, it is also necessary that there should be an express adjudication and not merely one which may either be inferred or be deemed to have been granted or refused without further argument.

Jadan Chandra Sirkar v. *Kailash Chandra Singh* [1], referred to.

Although a finding may be unnecessary, yet if it is embodied in the decree it will be *res judicata*.

Secretary of State v. *Swaminadha Koundan* [2], referred to.

Second Appeals against the decrees dated 29th August 1916 of the Court of the Subordinate Judge of Tuticorin in A. S. Nos. 84 and 85 of 1916, preferred against the decree of the Court of the District Munsif of Koilpatti in O. S. No. 520 of 1913.

K. Jagannatha Aiyar for Appellant in S. A. No. 275 of 1917.

V. Viswanatha Sastri for Respondent in S. A. No. 275 of 1917.

L. A. Govindaragava Aiyar and *S. Subramania Aiyar* for Appellant in S. A. No. 276 of 1917.

V. Viswanatha Sastri for Respondent in S. A. No. 276 of 1917.

The Court delivered the following

Judgments :—*Spencer, J.*—The plaintiff sued her brother and brother's sons in this suit for the recovery of certain immoveable property to which she claimed title under deeds of sale and gift from her father. Questions were raised at the trial whether these deeds represented real or sham transactions and whether the defendants had a good title by adverse possession for over the statutory period. The suit has been decreed in the plaintiff's favour, both the lower courts holding that the defendants are debarred from raising

Spencer, J.

1. (1916) 21 C. W. N. 693. 2. (1911) I. L. R. 37 M. 25=21 M. L. J. 643.

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these defences by the decision in a prior suit. O. S. No. 232 of 1910 on the file of the Court of the District Munsif of Koilpatti which makes these matters *res judicata.*

O. S. No. 232 of 1910 was a suit brought by the assignee of a mortgage to enforce a sale of the suit properties upon a bond executed by Muthulakshmi, who was 1st defendant in that suit and is the plaintiff in this suit. That suit was dismissed on the finding that the mortgage was a sham transaction devoid of consideration. The defendants in this suit were defendants 2 to 4 in that suit and they raised similar contentions when O. S. No. 232 was tried. Muthulakshmi then contended that they were unnecessary parties to that suit. The District Munsif M.R.Ry. M. A. Krishna Row, who tried that suit, was rightly of opinion that they were unnecessary, as they claimed under a title adverse to both the mortgagor and the mortgagee (*vide Jaggeswar Dutt* v. *Bhuban Mohan Mitra,* 1), and he proposed to strike their names off the record. Nevertheless, as they insisted on continuing on the record, we weakly allowed them to remain.

Now it is argued that the lower Courts were wrong in treating the two findings in O. S. No. 232 of 1910, viz., (1) that the deeds of gift and sale to Muthulakshmi from her father were, real and genuine, and (2) that these defendants had not acquired any title by adverse possession, as *res-judicata,* seeing that the finding as to the enforceability of the mortgage bond was sufficient to justify the dismissal of the mortgagee's suit, and that although the mortgagee could and did appeal and the appellate court also decided these questions against the defendants, the result of the suit could not have been otherwise even if the findings on these two issues had been the other way. I think that this contention is right and that the judgments of the Lower Courts cannot be supported on this ground. The decision in *Venkata Raju* v. *Ramanna* 2, quoted by the District Munsif has no bearing on the facts of this case, and it was an error to suppose that O.S. No. 232 of 1910 could have been dismissed on the decision of the two issues upon which the contentions of the defendants 2 to 4 failed. Following *Vasudeva Kullayya* v. *Narayanappa* 3, and *Jadav Chandra Sarkar* v. *Kailash Chandra Singh* 4, I am of opinion that there can be no *res-judicata* as between co-defendants

1. (1903) I. L. R. 33 C. 425.
2. (1913) I. L. R. 38 M. 158.
3. (1911) 9 M. L. T. 450.
4. (1916) 21 C. W. N. 693.

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in cases where it is not necessary to decide upon their conflicting interests in order to give the plaintiff the relief appropriate to his suit.

The respondent's vakil has not seriously attempted to support the finding as to *res-judicata*, but he argues that the defendants, having in the prior suit invited a decision upon these points, are estopped, not by record, but by conduct from turning round and saying in subsequent litigation between the same parties that that decision was wrong. If the principles of S. 115 of the Evidence Act are sought to be applied to the circumstances of the case there is no reason for suggesting that the plaintiff was led to alter the position that she has taken up all along, in consequence of these defendants persisting in being made parties to the mortgagee's suit. From the mere fact that the plaintiff was led to adduce evidence in the former case to substantiate her position it does not necessarily follow that she was prejudiced or induced to change her position by the defendant's inconsistent conduct. The decisions in *Collier* v. *Walters* [1] and *Aghore Nath Mookerjee* v. *Kamini Debi* [2], turned upon the construction of wills, and the decrees in the previous suits were of the nature of judgments *in rem* binding all persons who were parties to them. The Master of the Rolls pointed out in *Collier* v. *Walters* [1] that Willam Collier junior, the plaintiff in the subsequent suit, had made no attempt to impeach the correctness of the former decree and therefore he must be bound by it. In *Kristo Gopal Shaha* v. *Kasheenath Shaha* [3] and in *Bhajuchowdhury* v. *Chunni Lal Marwari* [4], the same person at one time set himself up as a necessary party to a suit and afterwards turned round and declared that he had nothing to do with it and had been unncessarily impleaded. Such is not the case here. The defendants simply maintained that they are not bound by the decision in O. S. No. 232 of 1910. Whether they were necessary parties to that suit is a question of law and there can be no estoppel on a point of law.

I am therefore of opinion that no case of estoppel arises from the facts of the present case. The decisions of the lower Courts on the 5th issue are reversed and the suit will be remanded to the Court of first instance for disposal on the merits after trial. Costs up to date to abide and to be provided for in the final decree.

1. (1873) L. R. 17 Eq. 252.
2. (1909) 11 C. L. J. 461.
3. (1866) 6 W. R. 66.
4. (1906) 11 C. W. N. 284.

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Seshagiri Aiyar, J.

Seshagiri Aiyar, J. :—I agree with the conclusion arrived at by my learned brother. But as the point for decision is one of some importance, I propose to say a few words.

It was conceded that the District Munsif was wrong in saying that the decree of the court in O. S. No. 232 of 1910 could have been based on either of the findings arrived at in that suit: The finding on the mortgage was fatal to the suit. The other finding which related to title as between the contesting defendants could not have non-suited the plaintiff. Such a finding was unnecessary and though asked for by the added defendants should not have been given in the suit.

In this view, *prima facie* the conclusion of the Court could not operate as *res judicata*: The principle underlying the bar of *res judicata* as between the co-defendants has been the subject of discussion in three recent cases, *Venkatasuryanarayana* v. *Sivasankaranarayana* [1], *Fakir Chand Lallubhai* v. *Naginchandi Kalidas* [2] and *Jadav Chandra Sircar* v. *Kilash Chandra Singh* [3]. The first requisite is that there should be active controversy as against each other between the parties arrayed on the same side: per Muthusamier, J., in *Venkayya* v. *Narasamma* [4] and *Tanjore Ramachandra Row* v. *Vellaya Nadan Ponnusami* [5]. Secondly the adjudication *inter se* between the co-defendants should be necessary to give the appropriate relief to the plaintiff. See per West, J., in *Ramachandra Narayan* v. *Narayana Mahadev* [6] and Wigram, V. C. in *Cottingham* v. *Earl of Shrewsbury* [7] and Jessel, M. R. in *Kevan* v. *Crawford* [8]. In the earlier case, the Vice Chancellor says. "But if the relief given to the plaintiff does not require or involve the decision of any case between co-defendants, the co-defendants will not be bound as between each other, by any proceedings which may be necessary only to the decree the plaintiff obtains." The third element mentioned in *Jadav Chandra* v. *Kailash Chandra Singh* [3] seems to imply that there should be an express adjudication and not one which may either be inferred or be deemed to have been granted or refused. Without further argument, I am not prepared to express a

1. (1914) 17 M. L. T. 85.
2. (1916) I. L. R. 40 B. 210.
3. (1916) 21 C. W. N. 693.
4. (1887) I. L. R. 11. M. 204.
5. (1891) I. L. R. 14 M. 264 (P. C.)
6. (1886) I. L. R. 11 B. 216.
7. (1843) 3 Hare 627.
8. (1877) L. R. 6 Ch. D 29.

definite opinion on this last point. For the purposes of this case, it is enough to say that the first two requisites are wanting.

Mr. Venkataramaier relied on certain observations made by the Master of the Rolls in *Collier* v. *Walters* [1]. I am prepared to concede that the observations at page 267 go a great way to help the respondent: but when the facts of the case are closely examined, the decision will be found to leave the present case unaffected. Under a will, one William Collier claimed the estate as the tenant-in-tail. He and his mortgagee sued the trustee appointed under the will for a declaration that William Collier was the tenant in tail, that his rights were assigned to the mortgagee, and that the trustee should convey to the mortgagee the rights of the mortgagor. To this suit, the son of William Collier was a party. His contention was that his father had only a life-interest in the property bequeathed, that the estate tail vested in him and not in his father, and that consequently the claim for a declaration that the trustee should convey the legal estate to the mortgagee was unsustainable. The Master of the Rolls pointed out that the son was not bound to put forward these pleas and could have asked to be dismissed from the suit, keeping his right to contest the conclusion in the suit untouched: but he claimed an adjudication of his rights. In the result, it was found that the father was tenant-in-tail and not the son, and that the mortgagee was entitled to a recognition of his rights by the trustee. The decree in the suit distinctly stated that the claim of the mortgagee was only subject to the equity of redemption possessed by the son Collier: The son preferred no appeal against this decree. In the subsequent suit, the son pleaded that the previous adjudication was not binding on him. Sir George Jessel held he was bound. The points of difference between that case and the present one are these: (*a*) The impleaded defendant in the English Case had the right of challenging the decision in appeal which he has not in this case: (*b*) The declaration against the son Collier was embodied in the decree of the court which has not been done in the present case. It is well settled that although a finding may be unnecessary, if it is embodied in the decree it will be *res judicata. Secertary of State* v. *Swaminatha Kowndan* [2]. These two considerations distinguish *Collier* v. *Walters* [1], from the case before us. I have referred to this case at some length, because I was somewhat

1. (1873) L. R. 17 Eq. 252. 2 (1911) I. L. R. 37 M. 25=21 M. L. J. 643.

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impressed by the able argument of the learned vakil when the observations were quoted before us at the hearing. I do not agree with him that the principle that a man should not both approbate and reprobate is applicable to this case or to the English case, I have referred to.

The other decisions do not take us very much further. In *Kristo Gopal Shaha* v. *Kasheenath Shaha* [1], the question did not arise in a subsequent suit. The point considered was whether a party who insists upon being put on the record and upon having his case dealt with can claim in the course of that suit or on appeal from that suit to be exonerated. The learned Judges expressly say that the question whether a decision against an unnecessary party will be *res judicata* did not arise in that case. On the other hand *Lallah Bholanath* v. *Beechoo Koonwar* [2], is strongly against the respondent. *Aghore Nath Mukerjee* v. *Kamini Debi* [3], proceeded on the ground that the decision was analogous to a judgment *in rem* and bound all the parties. I, therefore, agree with my learned colleague in holding that the previous adjudication does not operate as *res judicata* on the question of title.

On the question of adverse possession too, the same observations apply. Moreover, the fact that the claim was not barred as between the defendants on the date of the suit of 1910 is not conclusive on the question of adverse possession at the date of the present suit. This issue should have been tried under any circumstance: I agree as to the order as to costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE KUMARASWAMI SASTRI.

Kamepalli Ayilamma, and Damineni Ramachendriah ... *Appellants** (*Plaintiffs*)

v.

Mannem Venkataswamy, minor by mother and guardian, Rattamma and others. ... *Respondents* (*Defendants*).

Kamepalli Ayilamma v. Mannem Venkataswamy.

Hindu Law—Partition—Severance in status—Unilateral declaration by major Co-parcener—Minor Co-parcener—Communication to natural guardian, if essential.

* S. A. No. 1889 of 1915. 21st September, 1917

1. (1866) 6 W. R. 66. 2. (1864) 1 W. R. 50.

3. (1909) 11 C. L. J. 461.

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Though it is open to a member of a Joint Hindu family to become divided in status from the other members, by an unambiguous declaration of his intention to become divided, still to have that effect, the intention should be communicated to the other co-parceners. If the other co-parcener is a minor, an intimation of such intention to the person who would become the minor's natural guardian as soon as the partition is effected, is necessary.

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge of Guntur in Appeal Suit No. 304 of 1913 preferred against the decree of the Court of the District Munsif of Guntur in Original Suit No. 172 of 1912.

This Second Appeal came on for hearing in the first instance on Wednesday the 14th day of March 1917, when the Court (The Chief Justice and Napier, J.) delivered the following

Judgment:—The plaintiffs claim property conveyed to the 5th defendant by her husband which she says was allotted to him on partition. The Lower appellate court dealing with the case before the Full Bench decision in *Soundararajan* v. *Arunachalam Chetty* [1] came to the conclusion that enough was not proved to satisfy the tests till then accepted in such a case.

We have decided before disposing of the case to call for a finding on the evidence on record as to whether

(1) there was a division in status;

(2) a division of the properties binding on the minors and, if so

(3) whether the plaint properties fell to the share of the 5th defendant's husband. The findings should be submitted in six weeks and seven days will be allowed for filing objections.

[In compliance with the order contained in the above judgment, the additional Temporary Subordinate Judge of Guntur submitted findings to the effect that there was neither a division of properties by metes and bounds nor a division in status but that in a sale-deed executed by the major co-parcener he had inserted a recital to the effect that he had become divided in an alleged partition many years previously, which however was not a fact.]

T. Prakasam and *P. Chenchiah* for Appellants.

P. Narayanamurthi for Respondents.

The Court (the Chief Justice and Kumaraswami Sastri, J.,) delivered the following

Judgment:—The plaintiff in this Second Appeal failed to prove that the items of immoveable property which he seeks to recover had fallen to the share of the 5th defendant's husband on

1. (1915) I. L. R 39 Mad. 159=29 M. L. J. 816.

Kamepalli Ayilamma v. Manuem Venkataswamy.

partition. When the case came before the Court on the last occasion, as it had been decided by the Lower Courts before the Full Bench decision in *Soundararajan* v. *Arunachalam Chetty*,[1] we thought that it was desirable to ascertain whether although there had not been a division by metes and bounds, there had been a division in status having regard to the decision of the Privy Council in *Suraj Narain* v. *Ikbal Narain*[2] which was acted on by the Full Bench in *Soundararajan* v. *Arunachalam Chetty*[1]. The finding in this case is that in a sale-deed concerning immoveable property not in suit, the major co-parcener inserted a recital that he had become divided in an alleged partition many years previously which is found not to have been proved.

The question argued before us is whether this recital can be taken as having effected a severance in interest. It is not shown that it was communicated to anybody on behalf of the minor before the death of the major co-parcener and it is contended on the other side that in these circumstances he was undivided from his minor brother at the time of his death.

Now the position for which Mr. Prakasam has contended is that under the recent decisions of the Privy Council, it is not necessary that there should be any communication to the other co-sharers of the intention of the co-parcener to sever himself from the joint family. We are unable to accept that position. The language of Mr. Ameer Ali delivering the judgment of their Lordships in *Suraj Narain* v. *Ikbal Narain*[2] is that "to have that effect the intention must be unequivocal and clearly expressed." The natural meaning of that, in our opinion, is that it should be clearly expressed to other co-parceners who are the persons interested. But the matter is put beyond all doubt by the two following decisions of their Lordships. In one of them, *Girja Bai* v. *Sadashiv Dhundiraj*[3] Mr. Ameer Ali delivering their Lordships' judgment says "once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co-sharers can question it, nor can the Court examine his conscience to find out whether his reasons for separation were well-founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others." In the still more recent case in

1. (1915) I. L. R. 39 Mad. 159.
2. (1912) L. R. 40 I. A. 40.
3. (1916) L. R. 43 I. A. 151 at p. 160=31 M L J 455

Kawal Nain v. *Budh Singh* [1]. Lord Haldane delivering their Lordship's judgment applied the same rule to the decision of that case. He says "by his plaint he had claimed a fifth share of the family property, and their Lordships entertain no doubt that the claim amounted to an intimation to the defendants, his co-sharers, of the unequivocal desire of the plaintiff for separation from the joint family. If this be so, the judgment of the Judicial Committee (reported in the case we have referred to) renders it beyond question that the commencement of this suit for partition effected a separation from the joint family". This is a clear recognition of the necessity that the intention should be communicated to the co-sharers to effect a severance. As at present advised, we are not prepared to say that this doctrine does not apply even between a major co-parcener and a minor co-parcener. But we think that in such a case, there must be such an intimation as the case admits of, that is, an intimation to the person who becomes a natural guardian as soon as the partition is effected and that person in this case is the mother of the minor. She is clearly a proper person to protect the separate interests of her son and she is the person who, according to the invariable practice of the Courts, is in the absence of the father appointed guardian *ad litem* in a suit for partition instituted by a major against a minor. In the present case, no such communication is proved during the lifetime of the major co-parcener and therefore the only conclusion we can come to is that when he died, he was undivided in status from his brother.

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No doubt the plaintiff may have acquired the major co-parcener's share by virtue of the transfer in his favour, and may have succeeded to his rights and be able to work them out in a suit properly framed; but he has not established the right which he claims in this suit for possession of these specific items of immoveable property.

In the result therefore the Second Appeal fails and is dismissed with costs.

A. V. V.

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1. (1917) 44 I. A. p. 159. : 33 M. L. J. 42.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE OLDFIELD.

Kasi Viswanathan Chetty ... *Appellant** (*Petitioner*)

v.

Murugappa Chetty and another... *Respondents* (*Counter-Petitioners*).

Viswanathan Chetty v. Murugappa Chetty.

Civil Procedure Code—O. 21, R. 8—Decree—Transmission for execution to District Court—Transfer by it of decree to Sub Court of A for execution—Sale by that Court in execution—Validity—Jurisdiction—Transfer prior to sale of territorial jurisdiction over property to Sub Court of B—Property within territorial jurisdiction of Sub-Court of A at time of transfer of decree—Effect pending proceedings—Effect on, of transfer of territorial jurisdiction over property concerned.

A decree of the Chief Court of Lower Burma was transmitted for execution to the Dt. Court of Ramnad and was by that Court transferred for execution to the Subordinate Court of Ramnad. In execution of that decree the Subordinate Court of Ramnad sold immoveable property of the judgment-debtor which, at the time of the said sale, was admittedly situated in the territorial jurisdiction of the Subordinate Court of Sivagunga. On objection taken to the jurisdiction of the Subordinate Court of Ramnad to sell the property, *held* that though the transfer of the decree to the Subordinate Court of Ramnad might be valid on the ground that the property was on the date of such transfer situated in its territorial jurisdiction, yet the sale by that Court was invalid because on the date thereof it ceased to have territorial jurisdiction over the property.

Meaning of expression "Court of competent jurisdiction" in O. 21, R. 8 of the Code.

Pending proceedings are transferred by operation of law on the occurrence of any change of territorial jurisdiction over the property with which they are concerned.

Appeal against the order of the Court of the Subordinate Judge of Ramnad at Madura dated 14th February, 1916 in E. A. No. 361 of 1915 in E. P. No. 293 of 1914 (C. S. No. 58) of 1909 on the file of the Chief Court of Lower Burma).

L. A. Govindaraghava Aiyar and *A. Visvanatha Aiyar* for Appellant.

S. Subramania Aiyar for Respondent.

The Court delivered the following

Judgment:—The order before us is one passed under O. XXI, R. 90 of the Code of Civil Procedure, refusing to set aside a sale in execution. As regards the objections to it argued on the evidence relating to inadequacy of price and substantial loss we accept the Lower Court's observations and concur in its conclusions. The remaining objection that the sale was held without jurisdiction calls for more lengthy discussion. It arises as between appellant, the Judgment debtor, and 1st respondent, the decree-holder, and is

* C. M. A. No. 217 of 1916. 8th October, 1917

Viswanathan Chetty v. Murugappa Chetty.

that the lower court, the Subordinate Court of Ramnad, had no jurisdiction to sell property, which, it is admitted, is situated in the territorial jurisdiction of the Subordinate Court of Sivaganga. The decree under execution was passed by the Chief Court of Lower Burma and was transmitted by it for execution to the District Court of Ramnad, that court transferring it for execution to the lower court.

The objection has been met first by the argument that the lower court is of unlimited pecuniary jurisdiction and therefore of competent jurisdiction within the meaning of O. XXI, R. 8 of the Code of Civil Procedure. The transfer to it by the District Court of the decree for execution was accordingly such as the rule contemplates and conferred on it the jurisdiction necessary to support its proceedings, notwithstanding that territorial jurisdiction over the property to be sold was wanting. But this has been justified only by the assumption that the expression "court of competent jurisdiction" in the Rule should be interpreted as it must be, when it occurs in S. 24, with reference to territorial jurisdiction. The assumption is unsustainable, because it is negatived by the object of the last mentioned provision. For the competence of a court to try a suit does not depend on its possession of any power connected with territorial competence, since it has independently of it machinery for issuing process, obtaining the presence of parties and securing evidence throughout India. Otherwise as regards O. XXI, R. 8 of the Code of Civil Procedure and execution, since, apart from the special and exceptional procedure by precept, a court cannot act through its officers except within its territorial jurisdiction.

This follows from S. 39 (1) (b) and S. 42 of the Code of Civil Procedure. S. 38 is no doubt general in its terms. But the reference in it to "the court to which the decree is sent" must be read with reference to a sending authorised by law, that is subject to S. 39. And the reference to competence in Order XXI, rule 8 must be interpreted in the same way. It may be added that this reference was first made in Order XXI, Rule 8 of the present Code, the wording of S. 226 of the old Code of Civil Procedure corresponding with it having been modified, and it is therefore useless to refer to the only decisions on the point, those reached under the former law. The conclusion must in the circumstances be against the contention of the decree-holder, the 1st respondent.

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He has however argued in the alternative that the transfer of the decree to the Lower Court by the District Court was or must be presumed to have been to a court competent, when the transfer was made, and that its competence has not been affected by any subsequent transfer to the Sivaganga Court of jurisdiction over the village, where the property sold is situated. The transfer of jurisdiction to the Sivaganga Court took place, we have ascertained from the District Judge, on the 15th April 1913. Regarding the date of the transfer of the decree by the District Court there is nothing on the record before us. But, if it be presumed that it was before the transfer of jurisdiction and that the transfer of the decree was valid, that cannot avail the 1st respondent. For the material point is that the sale under consideration was held after 15th April 1913 in 1915,..........when the lower court had no territorial jurisdiction; and it is the law, as laid down in *Subbiah Naicker* v. *Ramanatha Chettiar* [1] a decision by which we are bound, that pending proceedings are transferred by operation of law on the occurrence of any change in territorial jurisdiction over the property, with which they are concerned. Therefore, if the lower court was at any time competent to execute the decree in virtue of any transfer to it prior to 15th April 1913, it forfeited its competence to keep the suit property under attachment or to sell it from that date. The decision cited dealt, like the present proceedings, with execution. The only ground of distinction from it suggested, that the notification transferring jurisdiction in question in it may have withdrawn, whilst that in question here did not withdraw, jurisdiction over the transferred area, would require clear support from the terms of the notifications, since such concurrent jurisdiction in the case of courts of equal grade is rare, if not unprecedented. But such support, we have satisfied ourselves, is in no degree forthcoming. This argument also must therefore be rejected.

As the sale was held without jurisdiction, it must be set aside, the appeal being allowed and the lower court's order being reversed with costs throughout.

A. S. V.

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1. (1914) I. L. R. 37 M. 462.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER AND MR. JUSTICE KRISHNAN.

Thacharath Parkum Etathatta ... *Appellants.**
Kannan Raman Kurup (dead) and others

v.

Thayath Veetil Parkum Kayathirakkal .... *Respondents.*
Chappan Nair and others

Raman Kurup *v.* Chappan Nair.

Limitation Act (XIV of 1859) Ss. 1 cl. 15 and 18—Limitation Act (IX of 1871, S. 29—Kanom—Redemption—Limitation—Acknowledgment of title after expiry of the period prescribed for redemption but within the period allowed by S. 18 of Act XIV of 1859—Effect of—Rights barred under repealed Act, not revived by later enactment.

In a suit instituted in 1911, to redeem a *Kanom* of the year 1798, it was found that the period of 60 years fixed by S. 1, Cl. 15, of Act XIV of 1859, expired in 1858 but that there was an acknowledgment of the mortgagor's title in 1861, (i. e) within the period of grace of 2 years allowed by S. 18 of that Act.

Held, that the suit was barred by limitation. The words "in the meantime" in S. 1. Cl. 15, of Act XIV of 1859 refer only to the 60 years mentioned in the first part of the clause and not to the period of grace allowed for a suit by S. 18 of the Act, and the acknowledgment was consequently ineffective to save Limitation.

A right to sue barred under a repealed Limitation Act is not revived by the passing of a new Act in the absence of a provision to that effect in the later enactment.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Tellicherry in A. S. No. 488 of 1913 preferred against the decree of the court of the Dt. Munsif of Payyoli in O. S. No. 337 of 1911.

C. Madhavan Nair for Appellants.

K. P. M. Menon for Respondents.

The Court delivered the following

Judgments:—*Spencer, J*:—Exhibit A having been found by both the lower courts to be not genuine, this suit has resolved itself into a suit to redeem a mortgage or kanom of the year 1798, corresponding to the Malabar year 974. Spencer, J.

The District Munsif found the suit to be barred by limitation. The Subordinate Judge reversed his finding on this point. I am of opinion that he was wrong and the District Munsif was right.

Under S. 1 clause 15 of the Limitation Act XIV of 1859 the mortgagors had 60 years from the date of mortgage to bring a suit for the recovery of their immoveable property. Those 60

* S. A. No. 386 of 1916. 14th August 1917.

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years expired in 1858. The clause however provides that, if in the meantime an acknowledgment of the mortgagor's title or of his right of redemption shall have been given in writing signed by the mortgagee, the 60 years will be reckoned from the date of such acknowledgment. In this case it has been found that there was such an acknowledgment in 1861. (Malabar year 1037). The Subordinate Judge thought that because S. 18 of the Act provided two years as a time of grace for suing under the law, as it existed before this statute of limitations was introduced, therefore two years must be included in the time within which an acknowledgment, if made, would extend the period of limitation.

S. 1 clause 15 is however quite clear to the contrary. The words "in the meantime" can only refer to the 60 years mentioned in the first part of the clause. If authority be needed, the case of *Fatimatul-nissa Begam* v. *Sundar Das* [1] is quite decisive on this point. At page 1010 the Judicial Committee of the Privy Council observed that under Act XIV of 1859 the right of mortgagors to sue was kept alive till 1862, but if they did not sue the act remained unqualified by the proviso as to acknowledgments.

For the respondents it has been argued that, as according to the Privy Council decision in *Soni Ram* v. *Kanhaya Lal* [2] the law of Limitation applicable to the case is not Act XIV 1859, the law in force at the date of the acknowledgments, but Act IX of 1908 which was in force at the time of the institution of this suit in 1911, the mortgagors must under Article 148 of that Act have 60 years from the date when the right to redeem accrued, that is in the case of kanom 12 years from the execution of the Kanom deed. This will bring us to 1870 and the acknowledgment having been made in 1861 before the expiration of the period prescribed for the suit, a fresh period of 60 years will, it is argued, under S. 19 of Act IX of 1908 have to be computed from the time when the acknowledgment was signed and thus the mortgagors had time till 1911 within which to institute their suit.

The answer to this ingenious argument is that the right of the mortgagors to sue having become barred as from 1858 by force of the Act of 1859 and their right to the land having been extinguished by S. 29 of Act IX of 1871 the subsequent Acts of limitation contained no provision whereby a right which had previously become extinct could be revived.

1. (1900) I. L. R. 27 C. 1004, (P.C.) 2. (1913) I. L. R. 35 A. 227.

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This is the view taken in *Mukkunni* v. *Mdnon Bhatta* [1] and in *Fatimatul-nissa* v. *Sundar Das* [2], and we must follow those authorities.

Spencer, J.

The appeal is allowed. We restore the decision of the District Munsif with costs here and in the Lower Appellate Court to be paid by the 1st and 5th respondents.

Krishnan, J

Krishnan, J.:—The question raised in this second appeal for decision is one of limitation. The Subordinate Judge has given plaintiffs a decree allowing them to redeem a kanom mortgage of 1798 overruling the defendant's objection that the right tore deem had become barred by limitation so long ago as 1862. To save limitation an acknowledgment of the mortgagor's title in 1861 is relied on. The question is whether that acknowledgment is sufficient for the purpose with reference to its date as it was made more than 60 years after the date of the mortgage.

Appellant's counsel argues that under Act XIV of 1859 the claim to redeem became barred in 1862 on the expiry of the period of two years granted under S. 18 of that Act in spite of the acknowledgment alleged. This argument is, I think, clearly well-founded. Under S. 1 clause 15 of that Act a suit against the mortgagee of any property for the recovery of the same was not maintainable after 60 years from the time of the mortgage unless *in the meantime* an acknowledgment of the title of the mortgagor was given in writing signed by the mortgagee or by some person claiming under him in which case the 60 years period had to be calculated from the date of that acknowledgment. The words used are " in the meantime" which can only refer to the first 60 years provided under the section. See *Mukkanni* v. *Manon Bhatta* [1]. The Subordinate Judge held that because under S. 18 a period of two years is given for all suits as if the Act had not been passed and as at the time the acknowledgment in this suit was made namely in 1861, a suit to redeem the plaint kanom would not have been affected by limitation by force of the above section, the said acknowledgment was sufficient to start a new period of limitation. In fact he has extended the scope of S. 18 to acknowledgments as well. There is clearly no warrant for this in the language of the section. It merely kept *the right to sue* alive for 2 years and as no suit was brought by plaintiffs before 1st January 1862 the bar under S. 1 clause 15 took effect.

1. (1882) I. L. R. 5 M. 182. 2. (1900) I. L. R. 27 C. 1004.

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See the observations of the Privy Council in *Fatimatulunnissa Begam* v. *Sundar Das* 1.

It was suggested that the words "in the meantime" should be taken as including also the period of grace of 2 years provided by the Act. Whatever doubts may arise if the words used were "the period prescribed" as in the later Limitation Acts there can be no possible doubt that the words "in the meantime" can only refer to the period mentioned in clause 15 itself. Admittedly the acknowledgment relied on in this case does not satisfy the requirements of clause 15; therefore after 1st January 1862 a suit to redeem this kanom of 1798 would have failed as barred by limitation. By S. 29 of Act IX of 1871 the right to the property itself became extinguished thereby.

It was however urged by Mr. Menon for the plaintiffs that we should apply Act IX of 1908 to the present suit as that Act was in force at the time of the suit and applying that, he claimed that his suit was in time. As an alteration has been made in the law with regard to the starting point of limitation in the case of suits to redeem in Act XV of 1877 and in the present Act, that point being now the date when the right to redeem accrues, whereas under the previous Acts the starting point was the date of the mortgage itself, the acknowledgment of 1861 though insufficient to save limitation under the older Acts being more than 60 years from the date of the mortgage should be sufficient under Act IX of 1908 as being within 60 years from the date when the right to redeem accrued as a kanom is not redeemable till after 12 years from its date under the Malabar Customary Law. Mr. Menon relied on the case reported in *Soni Ram* v. *Kanhaiya Lal* 2 and asked us to hold that his suit was not barred under Act IX of 1908 ignoring the position under the previous law.

The answer to this contention is that as the right to redeem in this case had already become barred in 1862 and the right to the property itself extinguished, there was thereafter no subsisting right in the plaintiffs to which the present Act could apply. No doubt the Limitation Act applicable to a suit is the Act in force when the suit is filed and if the suit is barred under that Act no further question arises. That was the position in the Privy Council case above cited. The further question that arises here did not arise in that case. The principle that the Limitation

1. (1900) I. L. R. 27 C. 1004. 2. (1913) I. L. R. 35 A 227.

Act applicable to a suit is one in force at the date of the suit is subject to the condition that the right sought to be enforced had not already been extinguished under the previous law. There is nothing in Act XV of 1877 or in Act IX of 1908 to show that the legislature intended to revive any extinct rights. The cases already cited *Mukanni* v. *Bhatta* [1] and *Fatima* v. *Sundar Das.* [2] are clear authorities for this view if any is needed.

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Krishnan, J.

It is therefore clear, that the plaintiff's right to redeem the kanom of 1798 was long ago barred and when they failed to establish the kanom of 1884 under Ex. A on which they primarily based their suit, the suit should have been dismissed. I agree with my learned brother in the order proposed by him.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE BAKEWELL.

Yelikepalli Venkaya and another ... *Appellants** (*Defendants*).

v.

Sri Raja Venkatramayya Apparao since declared major (vide order dated 10th January 1917 on C. M. P. No. 3658 of 1916) and another ... *Respondents* (*Plaintiffs*).

Yelikepalli Venkaya v. Venkatramayya Apparao.

Madras Estates Land Act, Ss. 9, 153 and 163—Old waste—Suit by landlord to eject a non-occupancy ryot—Forum.

A suit in ejectment against a non-occupancy tenant of old waste holding under a lease granted before the passing of the Estates Land Act, but which expired after the Act came into force, is maintainable only in the Revenue Court.

Second appeals against the decrees of the Court of the Subordinate Judge of Bezwada in A. S. Nos. 109, 110 and 111 of 1915 preferred against the decrees of the Court of the Additional District Munsif of Bezwada in O. S. Nos. 124, 100 and 102 of 1913.

V. Ramadoss for Appellants.

T. Ramachandra Row for Respondents.

The Court delivered the following

Judgment:—This is a suit in ejectment against a person who is admittedly a non-occupancy tenant of land described as old

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* S. A. Nos. 761 to 763 of 1916. 16th August 1917.

1. (1882) I. L. R. 5 M. 182. 2. (1900) I. L. R. 27 C. 1004.

Yelikepalli Venkaya v. Venkatramaya Apparao.

waste land within the meaning of the Estates Land Act. He had a lease before the passing of the Act which expired after the Act came into force. The question that arises is whether the suit must be brought in the Court of the Collector or in the ordinary Civil Court. This question of jurisdiction has been dealt with in a number of cases in this Court and the great preponderance of view is in favour of interpretation of S. 153 to the effect that the proviso to that section does not affect the question of jurisdiction which is dealt with by the section itself. That is to say, S. 153 lays down that a suit to eject a non-occupancy ryot shall be brought before the Collector and the proviso which has been added by the subsequent Act IV of 1909 to that section only lays down that as regards a non-occupancy ryot whose lease commenced before the commencement of the Act, the question regarding his liability to ejectment on the ground of the expiry of that lease is not affected by anything in S. 153. That, as pointed out by Oldfield, J., in *Sankaravenkataratnam* v. *Sri Raja Varadaraja Appa Rao* [1], deals only with the ground of liability to ejectment and does not affect the question of jurisdiction which is dealt with in the earlier part of that section. S. 9 of the Act says that no land-holder shall, as such, be entitled to eject a ryot from his holding or any part thereof otherwise than in accordance with the provisions of this Act: that is to say by a suit instituted in the Revenue Court. This seems to be quite comprehensive, but the learned Pleader for the respondent argues that the position of the defendant in this suit is that of a trespasser as contemplated in S. 163 of the Act. But S. 163, as has been pointed out in more than one ruling of this Court exempts from the operation of the Act, persons who have not come into possession of a ryoti land by legal transfer or by admission as ryot by the land-holder. The mere fact that a lease under which a man occupies ryoti land has expired, does not, as we read that section make him a trespasser within the meaning of that section.

The above view of the law has been adopted in a series of cases—*Vuppuluri Atchayya* v. *Kanchumarti Venkata Seetaramachandra Rao* [2], by Sankaran Nair and Sadasiva Aiyar, JJ., *Achapparaju* v. *Rajah V.G. Krishnayachendralavaru* [3] by Benson and Sundara Aiyar, JJ., *President, District Board, Tanjore* v. *Annasami*

1. (1915) 29 M. L. J. 184 at 187. 2. (1912) 13 M. L. T. 60=24 M. L.J. 112.
3. (1913) I. L. R. 38 M. 163.

Thondaman [1] by Oldfield and Sadasiva Aiyar, JJ., and in *Ardajeri Rama Reddi* v. *Karpi Sivaga* [2] and *Sankaravenkatarathnam* v. *Sri Raja Varadaraja Appa Row* [3] by Oldfield, J. Dissent has no doubt been expressed from that view by Spencer, J., in *Ponnusami Padayachi* v. *Karuppudayan* [4], but it does not appear that in view of the facts found in that case it was necessary to deal with this question. Tyabji, J. differed from Oldfield, J., in the case in *Sankaravenkataratnam* v. *Sri Raja Varadaraja Appa Rao* [3]. But we find that the learned Judge in an earlier case in *Rami Reddi* v. *Karpi Sivaga* [2], expressed a contrary view. The great preponderance of authority is undoubtedly in support of the contention of the appellant that jurisdiction in a case like this is in the Revenue Court and not in the ordinary Civil Court. No doubt the proviso to S. 153 might at first sight be taken to mean that the cases mentioned there were taken out altogether from S. 153 but that as explained by Oldfield, J., is not the effect of the proviso.

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We reverse the decisions of both the courts and direct that the plaint be returned to the plaintiff to be presented in the proper court. The appellants are entitled to their costs throughout.

Second appeals 762 and 763 follow.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE KUMARASWAMI SASTRI.

Palaniammal	... *Appellant* (21st defendant.)*
v.	
Muthuvenkatachala Maniagarar and others.	*Respondents (Plaintiffs, and 36th, 1st, 6th, 7th and 8th defendants.)*

Palaniammal *v.* Muthuvenkatachala Maniagarar.

Hindu Law—Joint family—Partition—Agreement by a member of the joint family with the manager under which the latter is to pay certain sums for maintenance—Whether effects a severance of the joint family—Suit for partition by one member of the family alone against the manager—Other co-parceners not parties—Decree passed awarding the plaintiff's share—Whether effects a severance of the other co-parceners' shares—Provision in a partition for a stranger, not being a bona fide *family settlement, invalid.*

Where a suit for partition of certain properties bequeathed under a will by a father is instituted and after finding that the properties were joint family properties and consequently the will was invalid, the lower court decreed partition of the

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* A. No. 216 of 1909 29th August, 1917.

1. (1916) 35 I. C. 121.
2. (1913) 21 I. C. 916
3. (1914) 29 M. L. J. 184.
4. (1914) I.L.R. 38 M. 843=26 M.L.J. 285.

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family properties and on appeal to the Sudder Adaulat, an agreement was entered into between a junior member of the joint family (in the present case, a partible zamindari) and the manager by which, the latter was to give the former Rs. 400 every month out of the zemindari income for maintenance and also certain lands to be cultivated by him and it stated that the provision was in consideration of the fact that a partition of the zamindari, which would if left intact be a source of protection to the family, will endanger the status of the zemindari and that it was with a view to prevent a division of the zemindari and to keep it as an impartible estate, such agreement does not in its true construction effect a severance of the joint family but only provides for a convenient mode of enjoying the joint family properties. *Sri Rajah Viravara Thodaramal Rajya Lakhshmi Duri Garu* v. *Sri Raja Viravara Thodhramal Surya Narayana Dhatrazu Bahadur Garu* [1] followed.

Where a junior member of a joint partible zemindari sues the manager for partition of his share not making the other co-parceners parties the decree in the suit which merely allots his share of the properties does not effect a division as between the other members and the manager so as to effect a partition between them also

The ruling of the Privy Council in *Girija Bai* v. *Sadastriv Dhundiraj* [2], to the effect that the filing of a plaint in a suit for partition is sufficient to effect a partition, does not mean that the effect of filing such a plaint is necessarily final. Treating the matter as one of individual volition, it is open to a co-parcener who has filed a suit for partition to abandon that intention before the suit proceeds to a decree and to continue in a state of jointness.

Where a partition takes place under a decree of Court whereby one member claims his share and obtains it, the effect of the decree on the remaining coparceners must be determined by the terms of the decree or where it is ambiguous by the scope of the suit. If the suit is one for general partition (in which case it is necessary to determine the shares of all the members and to grant relifes to all of them) and the decree declares the shares of all the members in the items of family property there will be a severance of status so far as the members are concerned and if the others in spite of the decree continue to remain joint it can only be under an agreement express or implied to re-unite. But where from the scope of the plaint or pleadings all that appears is that one member of an undivided family wanted to cut himself off from the rest after receiving his share and the other members neither asked nor evinced any desire for a partition *inter se*, the consideration of the shares of the others is only incidental for the purpose of giving the relief which the plaintiff wants and the joint status of the others is unaffected by the decree in favour of one member. *Sudarsanam Maistri* v. *Narasimhulu Maistri* [3], *Rukma Bai* v. *Balabux* [4], *Ranganadha Rao* v. *Narayanaswami Naicker* [5], *Durga Dei* v. *Balmukund* [6], *Rangaswami Naidu* v. *Sundararaja Naidu* [7], referred to.

Per *Kumarasawami Sastri, J.*:—An agreement whereby a considerable portion of joint family property has been excluded from partition and given to persons who have no legal claim whatever cannot be binding upon the minor sons simply because their father is a party to it unles it can be supported as a *bona fide* compromise of a disputed claim. *Ramkishore Kedarnath* v. *Jai Narain Ramrachpal* [8], followed.

Appeal against the preliminary decree of the District Court of Madura in Original Suit No. 42 of 1908.

1. (1897) I. L. R 20 M. 256. (P.C.)
2. (1916) L. R. 43 I. A. p. 151.
3. (1901) I. L. R. 25 M. 149.
4. (1903) I. L. R. 30 C. 725. (P. C.)
5. (1908) I. L. R. 31 M. 482.
6. (1906) I. L. R. 29 A. 93.
7. (1916) 31 M. L. J. 472.
8. (1913) I. L. R. 40 C. 966.

Palaniammal v. Muthuvenkatachala Maniagarar.

The Hon'ble the Advocate General (S. Srinivasa Aiyangar) for Appellant.

T. R. Ramachandra Aiyar, B. Sitarama Rao, S. R. Muthusami Aiyar for Respondents 1 and 2.

The Hon'ble Mr. T. Rangachariar and *S. Muthia Mudaliar* for Respondents 3 to 7.

The Court delivered the following

Wallis, C. J.

Judgment. :—*Wallis, C. J.* :—This Appeal appears to me to be quite unarguable on the question of the compromise, and I confine myself to the question whether the plaintiffs are entitled to partition of the suit lands as joint family property. The view taken in this Presidency prior to the Full Bench decision in *Soundararajan* v. *Arunachalam Chetty* [1] was that, while every coparcener had a right to partition, actual severance was only effected either by agreement of the co-parceners or by a preliminary decree in a suit for partition. The Full Bench felt bound to abandon that view in deference to the observations of their Lordships in *Suraj Narain* v. *Ikbal Narain* [2] and that they interpreted that decision correctly appears from the subsequent decision of their Lordships in *Girjabai* v. *Sadashiv Dhundiraj* [3] which must be taken as finally settling the question, *Kawal Nain* v. *Prabhu Lal* [4]. In *Girjabai* v. *Sadashiv Dhundiraj* [5] the cases are said "to establish clearly that separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision, the division and separation of his share, which may be arrived at either by private agreement among the parties or on failure of that by the intervention of the Court". There are however two observations which I wish to make on this with reference to the facts of the present case. As stated earlier in the judgment "separation which means the severance of the status of jointness is a matter of individual volition," and it has been ruled by their Lordships in accordance with these principles that the filing of the plaint in a suit for partition is sufficient to effect a partition. I do

1. (1915) I. L. R. 39 M. 159=29 M. L. J. 816.
2. (1912) L. R. 40 I. A. 43=24 M. L. J. 345=35 A. 80.
3. (1916) L. R. 43 I. A. 151=31 M. L. J. 455=43 C. 1031.
4. (1917) L. R. 44 I. A. 159=33 M. L. J. 42=39 A. 496.
5. (1916) L. R. 43 I. A. 151 at p. 160.

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not understand this ruling to mean the effect of filing such a plaint is necessarily final. Treating the matter as one of individual volition, it seems to me that it is open to a co-parcener who has filed a plaint for a partition to abandon that intention before the suit has proceeded to a decree and to elect to continue in a state of jointness. The reason for so holding is all the stronger in this part of India where the filing of a plaint for partition was not understood as of itself effecting a severance. Secondly, as to the effect of severance by one co-parcener or the other co-parceners, it is well settled that, when one co-parcener severs himself from the joint family, the other co-parceners may remain united *inter se*, as was recognised by their Lordships in *Ram Pershad Singh* v. *Lakhpati Koer* [1], and *Balabux Ladhuram* v. *Rukhmabai* [2]. The observation in the latter case that there is "no presumption, when the one co-parcener separates from the others, that the latter remain united" was a general one, and cannot, in my opinion, be read as affecting the presumption that the other co-parceners remain united at any rate in this part of India where all that is shown is that one co-parcener has severed himself and had his share allotted to him. In this state of things it is usual in this part of India for the other co-parceners to go on living as before, and I entirely agree with what my learned brother with his greater experience of the habits and customs of his countrymen has said upon the subject. See also *Ranganadha Rao* v. *Narayanasami Naicker* [3] and *Rangasami Naidu* v. *Sundarajulu Naidu*. [4]

These being the general principles, it only remains to apply them to the present case. The common ancestor purchased a mitta in the early part of the last century, and in 1835 one of the younger sons sued the eldest son for partition and another of the younger sons Shanmuga Kumara Maniagar was one of the defendants in that suit. When his son sued for partition in 1849, it was objected that his father had admitted in the suit of 1835 that the Zemin was impartible, but the Civil Court held that the plaintiff's father had not given up his claim for partition in that suit, but only expressed his willingness at the time to the estate being managed by the eldest brother as head of the family, Exhibit E. That is all we know of the suit of 1835, and it does not seem sufficient to warrant us in holding that the filing of the

1. (1902) L. R 30 I. A., 1=I. L. R. 30 C 231.
2. (1903) L. R. 30 I A. 130 1903. 3. (1908) I. L. R. 31 Mad. 482.
4. (1916) 31 M. L J. 472.

plaint in that case operated as a division in status of all the co-parceners.

Then we come to the suit 1843 which was a suit for partition and allotment of the share taken by the plaintiff under a will of the first Zemindar. The Civil Judge found that the will was not operative, as the property was joint family property and that the division in the will was beyond the powers of the testator, and passed a decree for the partition of the suit property dividing one half among the sons of the senior wife and allotting the other half to the son of the junior wife according to what he erroneously believed to be the rule of Hindu Law. Here again I do not think the filing of a suit for partition by the ancestor of the plaintiff's branch can be said of itself to have effected a severance, as when the case was under appeal to the Sudder Adalat the plaintiffs' ancestor entered into a razinamah, the effect of which will be considered later, and asked the Court not to proceed with the partition, and the Court acted on his application and inserted in the judgment what appears to be a declaration that the family was to continue joint.

While the appeal was pending, the appellant who was the eldest son of the deceased and senior co-parcener induced the widow of the third son on behalf of herself and her minor children to enter into a razinamah Exhibit B dated 1st June 1846 by which she is alleged to have released their claim to a share in consideration of his undertaking to grant them a fixed maintenance, and on the 29th November 1847, he obtained a similar release Exhibit I from the second son who was the 1st plaintiff in the suit and through whom the present plaintiffs claim. Subsequently to the decree of the Sudder Adalat on 12th December 1848 he obtained a release Exhibit B from his step-brother, the son of the junior wife of the deceased who had not been made a party to the suit of 1843. In 1849 one of the co-parceners who had been 2nd plaintiff in the suit of 1843 brought a suit for partition against the eldest son and senior co-parcener and obtained his share, the Court holding that he was not debarred from enforcing his claim by the action of his father during the suit of 1835 with which I have already dealt. The result of all these proceedings was that the eldest son of the purchaser and his descendants in the male line enjoyed all the properties left after the partition in 1849 on the strength of the

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releases Exhibits III, I, and B, until the death of the last male descendant in 1896 raised the question as to who was his right heir, a question which depends on the question whether or not he was divided at the time of his death.

As regards the plaintiffs' claim, the main question appears to me to be whether their ancestor parted with all the interest of his branch in what till then was joint family property in favour of the senior co-parcener by Exhibit I. If he did, I do not think that he acquired any rights under the decree of the Sudder Adalat in 1849 which does not appear to me to have been intended to affect the operation of the razinamah Exhibit I to which it refers. If he did not and continued a co-parcener, I do not think the filing of the suit of 1849 for partition against the senior co-parcener by another co-parcener to which he was not a party, and the fact that that co-parcener obtained a decree for his share effected a division in status between the senior co-parcener and the plaintiffs' branch. As I have already said a severance by one co-parcener does not effect a severance of the other co-parceners *inter se* when they all go on in the same way. The real question then seems to me to be the same as in the Belgam case in *Sri Raja Viravara Thodhramal Rajya Lakshmi Devi Garu* v. *Sri Raja Viravara Thodhramal Surya Narayana Dhatrazu Bahadur Garu* [1] whether by Exhibit I there was an effectual partition. In that case the junior son of the first Zemindar on behalf of himself and his heirs executed in favour of the elder brother and his heirs two pharikut sunnads, or partition deeds, by one of which he undertook on behalf of himself and his heirs not to make any further claim on the estate in consideration of the village allotted to him. Their Lordships affirming the judgments of the District Court and this Court, to which we have referred, held that this deed did not preclude the descendants of the younger brother from taking in preference to the 1st defendant who was the widow of the last male descendant of the elder brother. They did not find any sufficient evidence in the arrangement made by these documents of an intention to take the estate out of the category of joint or common family property so as to make it descendible otherwise than according to the rules of law applicable to such property. The parties in that case appear to have dealt with the estate on the footing that it was impartible

1. (1897) L. R. 24 I. A. 118, 122=20 M. 256.

although it was not so, and their Lordships observed that the junior brother accepted the appropriated village for maintenance in satisfaction of such rights as he conceived he was entitled to.

The facts of the present case differ in many respects. The first Zemindar had seven sons, two of whom died without issue and may be disregarded. When Exhibit III and Exhibit I were executed a preliminary decree for partition, Exhibit C, had been passed in the suit on the alleged will, and was under appeal by the 1st defendant the eldest brother. If that decree had stood, there can, I think, be little doubt that it would have effected or recognised a division in status. What was stipulated by Exhibit III between the Zemindar and the representatives of the third brother was that the Zemindar and his heirs were to pay an annuity of Rs. 400 for ever, as well as surrender to them certain lands, etc., that the terms might be enforced in execution, and that the eldest brother and his heirs should be entitled to the gains and liable for the losses of their branch. Exhibit I, which was executed subsequently between the eldest brother and the second brother, purports to be on the same lines as Exhibit III and is in similar terms, but contains a recital that the settlement was come to in consideration of the fact that "if the aforesaid Zemindary is partitioned, the status of a Zemindary which would ever be a source of protection to the family will be endangered" and with a view to prevent it, it concludes with the stipulation that the second brother should not proceed with the partition suit and that the Zemindar should be entitled and liable to all the gains and losses of his share. Accordingly the second brother who was the 1st respondent filed his razinamah and said he did not want a partition and the appellate decree did not award one. In this state of things I think the present question depends upon what is the right construction of Exhibit I. Now Exhibit I was only an agreement between the Zemindar, the senior co-parcener, and one of the junior co-parceners. It did not bind the other co-parceners and did not prevent another co-parcener from filing the suit of 1849 for partition against the Zemindar. On a careful consideration of the question, the conclusion to which I have come is that the effect of Exhibit I was that the senior co-parcener and his heirs were to be left in possession of the estate as Zemindars subject to the terms of the instrument, but I do not think it evidences an intention on the part of the junior co-parcener who

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executed it to cut himself and his branch off from the joint family, so that in the event of failure of the direct heirs of the senior co-parcener, his share should pass by survivorship to the other co-parceners who were not then separated to the exclusion of the executant of Exhibit I and his heirs. On the whole I think there is even less reason than in *Ram Autar* v. *Raja Mahammad Wumtaz Ali Khan* [1] for presuming an intention to take the estate out of the category of joint or common family property.

Assuming that Exhibit I did not effect a severance of the second brother's branch from the joint family, the question is whether it is any bar to a suit for partition by the plaintiffs who are members of that branch, or whether the 2nd and 3rd defendants who are also members of that branch are entitled to resist partition as the nearest dayadis of the last male of the senior branch and so heirs to his separate or self-acquired property. The District Judge has held that Exhibit I if regarded as an agreement not to partition is illegal and void.

It is unnecessary to consider how far Exhibit I regarded as an agreement not to partiton could have been enforced between the parties to it. It is, I think, clear that after the failure of the senior co-parcener's branch, it cannot operate to prevent the plaintiffs from suing the other members of their branch including the 2nd and 3rd defendants and the rest of the joint family for partition. *Rajender Dutt* v. *Sham Chund Mitter* [2] *Ramalinga Khanapure* v. *Virupakshi Khanapure* [3] *Radhanath Mukerjee* v. *Tarucknath Mukerjee* [4]. This is the main question in the case. In this and other respects, I agree in the conclusion arrived in the judgment prepared by my learned brother and in the order proposed by him.

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Kumaraswami Sastri, J :—This appeal arises out of a suit for partition of an estate known as the Vadimitta estate. It originally belonged to one Perayur Muthukumarasami Maniagar who died several years ago leaving six sons by his first wife and one by his second. The case for the plaintiffs is that the descendants of the various branches continued to be members of an undivided family, that the Mitta is partible property and that they as the descendants of the second son of the propositus are entitled to 1/12th share in the estate. There is no dispute about

1. (1897) L. R. 24 I. A. 107, 114.
2. (1880) I. L. R. 6 Cal. 106;
3. (1883) I. L. R. 7 Bom. 538;
4. (1875) 3. C. W. N. 126.

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the relationship of the various parties to the suit as set out in the pedigree annexed to the plaint. The property admittedly continued to be in the possession and enjoyment of the descendants of the first son of the propositus. The male descendants of that branch became extinct with Ponnusami Maniagar who died a minor on the 16th October 1896 leaving no issue but only a sister Palani Ammal who is the 21st defendant in this suit. When Ponnusami Maniagar died, the Mitta was under the management of the Court of Wards and the Collector, after the death of Ponnusami Maniagar, instituted an interpleader suit as there were various rival claimants to the estate. To that suit the present plaintiffs were not parties but their father was the 8th defendant. The suit was compromised and he got a share in the estate. The plaintiffs impugn the compromise as being in fraud of their rights and as having been entered into by their father under coercion and undue influence. They also allege that their father was a drunkard and a man of dissolute habits and was not protecting them and that the compromise was manifestly to their disadvantage as a large portion of the estate was excluded from the partition. The case for the appellant is that the descendants of the various branches became divided several years ago, that the estate was in the enjoyment of Ponnusami Maniagar the last male holder as divided property, that the plaintiffs, who are the sons of the 1st defendant in the suit being more remotely related to the deceased male holder than their father, have no interest in the property and that, assuming they have any interest, the compromise entered into in the interpleader suit is valid and binding on them as it was entered into by their father *bona fide* and for their profit. The District Judge held that the plaintiffs were members of an undivided family with the deceased Ponnusami, that they were entitled to a share in the estate and that the compromise entered into by their father was not binding on them. Two questions arise for determination in this appeal. The first is whether the mitta was held as divided property by Ponnusami Maniagar in which case the plaintiffs would admittedly have no claim, their father being a nearer Dayadi than themselves and secondly, whether the compromise entered into by their father is valid and binding upon them. So far as the division or non-division is concerned, there has been no formal partition deed between the various members of the family, and it is not alleged

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that the estate was at any time divided by metes and bounds. Reliance has been placed by the learned Advocate-General upon legal proceedings and documents (Exhibits *B,D.E,F.* I, II and III) as evidencing a divided status and it is necessary to consider the various decrees and documents referred to in order to determine whether they in fact effected a division in status between the several sons of the propositus.

Perayur Muthukumarsami Maniagar the propositus died leaving a will wherein he purported to give the Mitta to his sons by his two wives in unequal shares. A suit was filed in the Zillah Court of Tinnevelly by Thambusami Maniagar, the ancestor of the present plaintiffs, Kumara Muthayasami Maniagar, the 4th son of Muthukumarasami Maniagar, the widow of Gopalasami Maniagar, the third son as guardian of her minor children and Mannarsami Maniagar, the grandson of Muthukumarasami by his son Shanmuga Kumaran Maniagar against Muthu Venkatachalasami Maniagar, the eldest son of Muthukumarasami Maniagar. The pleadings are not filed but it appears from Exhibit A (the decree of the Zillah Court of Tinnevelly) that the plaintiffs claimed a division of the estate on the ground that Muthukumarasami Maniagar left a will dividing the estate between his sons. The suit was resisted by Muthuvenkatachalasami Maniagar, the eldest son on the ground *inter alia* that the Mitta was not divisible and that the will executed by their father was invalid under Hindu Law. The Zillah Judge found that the estate was purchased by the father of the 1st plaintiff and defendant and that it was partible property but was of opinion that the division made by the father was invalid. He proceeded to deal with the case under the Hindu Law as he understood it declaring the rights of the parties to the estate according to what is called *Pathnibhagam* (shares according to wives) the six sons by the first wife being declared entitled to one-half and the only son by the second wife to the other half. The decree also dealt with the personal property left on similar lines. It will thus be seen that, although the plaintiffs wanted their share from the defendant, all that was done by the Zillah Judge was to declare that the plaintiffs and defendants were entitled to half the Mitta jointly and that the son by the second wife *who was not a party to the suit* was entitled to the other half. An appeal was filed against this decree to the Sudder Adalat Court and Exhibit D is the decree of that Court. The Suddar Adalat Court held that

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the will alleged to have been executed by the father of the parties was invalid under Hindu Law, that the estate was partible but that the principle of the division effected by the Zillah Judge was wrong, the estate being divisible not according to *Pathnibhagam* but between the several sons equally, irrespective of whether they were the sons by the first or second wife. In paragraph 35 of the judgment, the Sudder Court resolved to amend that portion of the decree of the lower court which related to the division of the estate according to *Pathnibhagam* and "to adjudge that the heirs to the estate in dispute are entitled to share in the same in the manner laid down by the Hindu law of inheritance." In paragraph 36 they state that "the suit having been originally brought to obtain a share in the estate under a will which has been rejected, the Court of Sudder Adalat do not consider that they are called upon to direct that a sub-division of the estate be now made in accordance with the law of inheritance, no such question being before the Court" In paragraph 37 they state "it is therefore left for the heirs, or for such of them as may be dissatisfied with the management of the joint estate by the head of the family, to adopt such a course of proceeding as they may seem fit to obtain the surrender to them of their respective portion or portions of the estate." After the decree of the Zillah Court and during the pendency of the appeal to the Sudder Court the first plaintiff in that suit who was the second son of Muthukumarasami Maniagar and the great-grand-father of the present plaintiffs executed a deed (Exhibit I) in favour of the defendant in that suit who was his eldest brother. This document was filed in the Sudder Court and paragraphs 21 and 22 of the judgment (Exhibit D) refer to it. In paragraph 21 it is said that a razinama had been filed by the 1st respondent stating that he no longer wishes to press the appellant for a partition of the estate, and in paragraph 22 it is stated that the only respondent left to continue the action is Mannarasami, the son of Shanmuga Kumaran Maniagar who was the fifth son of the propositus. Exhibit I which is dated the 29th of November 1847 purports to be a razinama presented by the great-grand-father of the present plaintiffs who was the 1st respondent, and his eldest brother who was the appellant in the appeal to the Sudder Court. It recites that the eldest son Muthuvenkatachalasami Maniagar continued to enjoy the Zemin according to the hereditary practice of Zemindars, that the other

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respondents to the appeal were entitled to maintenance, that the plaintiffs in the suit, considering that the rate of maintenance given to them was insufficient, filed a suit for partition which resulted in a partition being directed by the Civil Court and that the parties to Exhibit I effected a compromise of their disputes. Paragraph 2 of the razinama states that in consideration of the fact that a partition of the Zemindari, which would, if left intact, ever be a source of protection to the family, will endanger the status of the Zemindari and with a view to prevent a division of the Zemindari and to keep it as an impartible estate, the 1st respondent to the appeal was to get Rs. 400 per annum payable to him out of the Zemindari income by the appellant and also certain lands to be cultivated by him and also certain other small benefits which are not material. The document winds up as follows:—"As the 1st respondent and the appellant amongst us have executed between them *Oodambadikkai kararnamah* on stamp papers to the above effect so that the 1st respondent Thambyaswami Maniagar may not take any further steps in the partition suit and that the appellant and his heirs should be entitled to the gains and liable for the losses of the 1st respondent's pangu (share) it is requested that the Court may be pleased to order the razinama to be filed in the above suit and stop the trial on behalf of the 1st respondent." On the 1st June 1846 a razinama (Exhibit III) was entered into between Muthuvenkatachalasami Maniagar and Avudaithangammal (widow of Gopalasami Maniagar the third son of Muthukumarasami Maniagar) acting for herself and on behalf of her minor children. It recites that a suit was filed because the defendant did not pay them adequate sum for their maintenance, that the defendant after the passing of the decree in that suit was attempting to appeal to the Sudder Court and that the parties in the presence of the Court have agreed that the defendant (who is called the Zemindar) should pay for the maintenance of the third branch of the family, which consisted of the two sons of Gopalasami Maniagar and the widow, Rs. 400 every year from the income of the Zemindari, that certain lands were to be given to them and that the sum of Rs. 400 should continue to be paid by the said Zemindar and his heirs to the third branch and their descendant. From the endorsement of the Civil Judge it appears that Exhibit III was filed in Court on the 8th June 1846 which is about three months after the decree

(Exhibit A) passed by the Civil Judge in the suit. On the 12th December 1848, Exhibit B, which purports to be a razinama agreement, was executed by Muthuvenkatachalasami Maniagar the eldest son of the propositus by his first wife to Sundarabala Kumarasami Maniagar the son of the propositus by his second wife. It recites that there were misunderstandings between them and that they entered into that agreement in settlement of all the disputes. It states that the executant and his successors in title should be entitled to the Pattam (succession) and to all rights in the Zemindari (Mitta) that Rs. 1,000 every year should be paid to Sundarabala Kumarasami Maniagar and his successors for maintenance and that some lands should be given to him for cultivation. The amount of maintenance is charged on certain villages specified in the agreement. The document winds up as follows:—"that excepting this, you have no right either heretofore or hereafter to any property moveable or immoveable; that you yourself shall discharge the debts contracted by you; that you shall have nothing to do with the decision of the Tinnevelly District Court in the suit brought by your younger brothers against us; that you too are entitled to a share; that you shall have nothing to do with whatever decision that may perhaps be passed about your share by the Sudder Court in Appeal No. 20 of 1846 preferred by us against our younger brothers; and that hereafter there shall be no Dayadi suit about anything between you and us." It appears from this agreement that a counter-part was executed by Sundarabala Kumarasami Maniagar in favour of his brother. In 1849 a suit was filed on behalf of Mannarasami Maniagar, the eldest son of Shanmuga Kumaran Maniagar for a fifth share in the Vadimitta Estate. It will be remembered that in the decree of the Sudder Court he was said to be the only respondent who was left to continue the action. It was alleged that by the decree of the Sudder Court the heirs were referred to a regular suit if they were dissatisfied with the management of the property by the head of the family and wanted a partition of the estate and that the plaintiff was therefore entitled to a division as he was dissatisfied. The plaintiff stated therein that other four persons entitled to an equal share in the property were the eldest son of the deceased propositus, his second son Thambiasami Maniagar (great grandfather of the present plaintiffs), Sundarabala Kumarasami Maniagar, son of the propositus by his second wife and Muthukumarasami Maniager, the grand-son of the propositus. The only defendant to

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the suit was Muthu Venkatachalasami Maniagar the eldest son of the deceased propositus. He defended the suit on the ground that the Mitta was not divisible, that razinamas had been entered into by certain other heirs of the deceased relinquishing their claim for a partition and consenting to receive maintenance, that the plaintiffs' father admitted in Suit No. 8 of 1835, that the Mitta ought to be enjoyed according to primogeniture, that the parties renounced their claim for a division of the estate and that the plaintiffs had two step-brothers who ought to be made parties to the suit. The Zillah Court held that the decree of the Sudder Adalat Court was conclusive as regards the estate being partible, that the plaintiffs' father did not give up his claim for partition in Suit No. 8 of 1835 but only expressed his willingness at the time to the estate being managed by the defendant as the head of the family and that it was not necessary to consider the claims of the plaintiffs' step-brothers as they would, if at all, be entitled to a partition of the share allotted to the plaintiffs. The Judge awarded one-fifth share of the mitta to 1st plaintiff subject to the claims which his step-brothers might establish. An appeal was filed by the defendant to the Sudder Court and the decree of that Court is marked as Exhibit F.

On appeal objection was taken by the appellant that two of his brothers who were alive ought to have been made parties to the suit and that the suit was therefore bad for non-joinder. With regard to that plea, the Sudder Court in dismissing the appeal observed as follows :—" Neither is the presence of the appellant's brother in the suit requisite, seeing that appellant as head of the family holds the property in issue and the shares of his brothers in the computation of that claimed by the appellant have been allowed for." After the death of the decree-holder one of his widows sold the interest of her husband, under the decree for partition which he had obtained, to Muthukumarasami Maniagar of the first branch of the family by Exhibit C, dated 31st October 1870. The document recites that Muthukumarasami Maniagar was Zemindar of four shares, that her (executant's) husband died on the 25th September of that year indebted to the extent of Rs. 8,000 and that the widows were not able to discharge the debt.

It will thus be seen that by various agreements or transfers the first branch of the family continued to be in possession and

enjoyment of the Zemin without any actual partition being effected. In 1873 Muthukumarasami Maniagar mortgaged the Zemindari to one Alagappa Chetti for Rs. 600 under the document Exhibit II, dated the 17th September. The purpose of the mortgage does not appear and this document is not of much use as there is no recital as to the property being divided or undivided.

These are all the documents relied upon to show that the first branch of the family was divided in status although there was no actual partition at any time. So far as the 7th branch of the family is concerned, namely, the branch descended from the second wife of the propositus, the District Judge has held that Exhibit B was a complete severance of interest between that branch and the others and having regard to the express terms of the Exhibit B which I have already set out the District Judge is correct. Nothing can be clearer than the recitals in exhibit B that the parties to it should have no kind of common interest subsequent to its date and that the son by the second wife had transferred his share absolutely in consideration of a fixed payment and certain lands allotted to him.

As regards the second branch, the only documents that could affect the rights of the parties are Exhibits I, D, E and F and the question is whether these documents show unequivocally that the parties intended to be separated in status.

It is argued by the learned Advocate-General that the effect of the suit filed in the Zillah Court by the great grand-father of the plaintiffs was to create a severance in status whatever must have been the ultimate decision in that suit, and that, even if there was any doubt as to the effect of the decree, Exhibit I is an out and out assignment of the share of the great grand-father which left to that branch no other rights but to claim the maintenance allowed to the plaintiff and his successors.

It is contended for the respondents that the suit in the Zillah Court was not one for partition of an undivided estate but only a suit to get the shares given under the will of their father, that there was no question of co-parcenary rights in the litigation, that the effect of the decree of the Sudder Court was to dismiss the suit as filed and that the declaration in paragraph 37 of the decree of the Sudder Court (Exhibit D) which leaves the family undivided and puts the first branch of the family in the position of managing

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members of the family, was expressly made to prevent any doubts that might otherwise arise.

As regards Exhibit 1, it is contended that it was only an arrangement for a better enjoyment of the property the parties being under the impression that they could by agreement render the estate impartible and that it would be advantageous to them to leave the property undivided and to get only maintenance. It is also argued that it was superseded by the decree passed subsequently by the Sudder Court (Exhibit D) or that in any event they must be read together.

I am of opinion that there has been no division in status between the various members of the family. In considering the decree Exhibit D and the effect of the various recitals in the documents and the intention of the parties who entered into the various transactions so far, as their status was concerned, it should be borne in mind that till the recent decision of the Privy Council in *Girja Bai* v. *Sadashiv Dhundiraj* [1], the view current in the Madras Presidency was that, to effect a division of status between the members of a joint family, a mere unilateral declaration or the filing of a suit for partition was not sufficient and that there should be either the consent of all the co-parceners or a decree of Court, either preliminary or final, putting an end to the co-parcenary. I need only refer to the judgment of Mr. Justice Bhashyam Aiyangar in *Sudarsanam Maistri* v. *Narisimhalu Maistri* [2], and *Subraya Mudali* v. *Manika Mudali* [3], Even assuming that a unilateral declaration was then thought to be sufficient, the question is whether the documents above referred to by me show that the great grand-father of the present plaintiffs during the course of the proceedings in the Zillah Court in 1846 and Sudder Court in 1849 or when he executed Exhibit I in 1847 unequivocally and unmistakably manifested his intention to separate himself from the elder branch. As regards Exhibit A the decree of the Zillah Court in the suit filed by the plaintiffs' great grand-father the claim was for a share of the estate according to the directions in the will of the propositus. It is no doubt true that the foundation of the claim would be immaterial so long as the effect of the decree in the suit is to sever the status at least so far as the property sought to be divided is concerned. The fact that no decree was ultimately passed would also be immaterial if it appears that

1. (1916) I. L. R. 43 Cal. 1081. 2. (1901) I. L. R. 25 Mad. 149
3. (1896) I. L. R 19 Mad. 345.

the person desiring a partition evidences no intention during the course of the suit of abandoning his intention of cutting himself off from his co-parceners. The plaintiffs' great-grand-father however did not continue the fight to a finish but during its pendency expressed (according to the recitals and terms of the decree) in a clear manner that he did not want a partition and that he preferred to continue joint as before. Assuming the mere filing of a plaint is sufficient to sever the status of the co-parcener it seems to me that till a decree is passed in that suit it is open to the plaintiff to change his mind and to withdraw the suit so as to leave him in the same position as if no suit had been filed. I can find nothing either in Hindu Law or in the decided cases to countenance the view that a mere expression of an intention to separate is irrevocable. The decree of the Sudder Court, in my opinion left the parties, just where they were before the filing of the suit, the view of the Sudder Court being that the whole action was misconceived, that the will upon which the claim was based was invalid and that the parties should, if they wanted anything, take separate proceedings. Paragraphs 36 and 37 of the decree, to my mind, make this perfectly clear. In paragraph 36 the Sudder Court observe "this suit having been originally brought to obtain a share in the estate under a will which has been rejected, the Court of Sudder Adalat do not consider that they are called upon to direct that a sub-division of the estate be now made in accordance with the law of inheritance, no such question being before the Court," and to emphasise their view they state in paragraph 37 "it is therefore left for the heirs or for such of them as may be dissatisfied with the management of the joint estate by the head of the family to adopt such a course of proceeding as they may see fit to obtain the surrender to them of their respective portion or portions of the estate." The effect of this paragraph is to leave the estate joint as before, to treat the defendant as the head of the joint family and to leave the parties, if they wanted a separation to file regular suit. This view is also supported by the fact that the Sudder Court in Exhibit F in disposing of the plea of non-joinder of the brothers of the defendant held that they were unnecessary parties as the appellant who was the head of the first branch held the property as manager of the joint family consisting of himself and his brothers. It is difficult to see how the plea of non-joinder could have been got over if, as a matter of fact, the first defendant was

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a divided member and his brothers had specified and divided shares in the estate given to them by the decree of the Sudder Court Exhibit D), it bein clear that in a suit by a co-sharer for a partition by metes and bounds all the other co-sharers divided in status and owning shares not actually divided are necessary parties Turning to Exhibit I, it is by no means a clear and unambiguous document. I am of opinion that, having regard to the surrounding circumstances, it can only be treated as an arrangement as to the mode of enjoyment of the property and not a document which effects a partition or separation in status. It should be remembered that the 1st defendant in the Zillah Court suit had been contending for several years previously that the estate was in the nature of an impartible estate to be enjoyed according to primogeniture and that the other members were only entitled for maintenance. That this view was put forward so early as 1835 appears from the judgment of the Civil Judge (Exhibit E). It appears that in 1835 a suit for a partition of the Mitta was filed by one of the members, that objection was taken that it was impartible and that a razinama was then entered into whereby the person claiming the partition was given maintenance. Although it was argued that the effect of it was to deprive the ancestor of the plaintiff in the Zilla Court Suit of his share the Court held that it was only an arrangement as regards division. The effect of that arrangement in the opinion of the District Judge was only an expression of his willingness at that time to allow the Mitta to be managed by the defendant as head of the family. Turning again to Exhibit I, we find that, although the Civil Judge had decreed that the estate was partible, and the decree was pending in the Appellate Court the document recites that according to the hereditary practice of Zemindars, Muthu Venkatachalaswami Maniagar of the first branch was to continue to enjoy the Zemin, that the executant and the other dayadis were only entitled to maintenance and that the suit was brought because sufficient maintenance was not paid. Paragraph 2 recites that the parties considered "that if the Zemin is partitioned, the status of a Zemindari, which would ever be a source of protection to the family, would be endangered" and the razinama was effected to prevent the danger apprehended. The amount payable under this document is expressly said to be maintenance and there can be little doubt that the frame of the whole document proceeded on the footing that the estate was deemed to be

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impartible and that maintenance should be awarded to the various persons who, if the estate were partible, would be entitled to a share in the estate. This document is similar to the document which their Lordships of the Privy Council had to consider in *Sri Rajya Lakshmi Devi Garu* v. *Sri Raja Surya Narayana Dhatraju Bhadur Garu*, [1], and their observations in dealing with the two documents in that appeal to the effect that the terms evidenced nothing more in substance than an arrangement for the mode of enjoyment of the property and were quite consistent with the legal character of the property as it stood on the date of the document will, I think, equally apply to the present case Their Lordships were dealing with partible estate which one of the parties, wanted to treat as impartible estate. In the present case, although the decree of the Zillah Court declared that the estate was partible, the parties to Exhibit I wanted to give the go-by to that declaration and to impress impartibility on the Zemin. The fact that the parties could not legally, do so is immaterial as we have to consider the document in the light of what the parties intended to do. If the parties treated the estate as impartible and entered into that arrangement, I think the document should be considered with due regard to the basis on which they acted and the object they had in view. That there was no intention to create a divided status between them appears from the fact that Exhibit I expressly makes a sum payable under it for *maintenance* by the Zemindar in possession of the estate to his brothers and that there are no words in Exhibit I similar to the concluding portion of the recital in Exhibit B and nothing to indicate clearly that the parties intended to sever their status as co-parceners. It is also significant that although Exhibit I was filed in the Sudder Court, no claim was made by the then senior member in whose favour it was executed that by virtue of Exhibit I he had acquired the share which the plaintiffs' great-grand-father would have been entitled to under Hindu Law. The document was evidently treated as a maintenance deed and not one conveying a share of the estate. Similarly in the proceedings (Exhibit F) it was not alleged by the "Zemindâr" that owing to Exhibits I and III he had become solely entitled to the shares of those two co-parceners. The concluding sentence in Exhibit I that the eldest brother and his heirs should be entitled to the gains and be liable for the losses of

1. (1897) I. L. R. 20 Mad. 256.

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his brothers' pangu (share) might, if it stood alone, suggest that the brother in lieu of a fixed maintenance gave up all rights to a share, but it must be read in the light of the recitals in the previous portion of the document, and I think all that the words mean is that the amount of maintenance payable to the executant should neither be increased nor decreased by reason of the income of the estate either increasing or diminishing. Having regard to the above facts, I do not think any argument can be founded on the fact that the members of the first branch continued in exclusive possession as the very object of Exhibit I was to enable them to do so. Difficulties only arose when that branch became extinct

It has been argued that whatever the effect of the proceedings in the Sudder Court which ended in the decree (Exhibit D) may be, there was a clear decree for partition in favour of one of the grandsons of the propositus in the proceedings in the suit which led to the decree (Exhibit E) being passed by the Zillah Judge and that at least from the date of that decree all the co-parceners should be treated as members of a divided family as the severance of one member from the joint family effects a severance between all the other members *interse*. The question as to how far the separation of one member necessarily involves the separation of the rest is not free from difficulty. It very often happens that in undivided families in Southern India, consisting of several members, one of them (who is often a spendthrift) either separates himself from the family after receiving his share or is cut off from the family by the other members after giving him his share. The other members of the family go on just as before and nobody ever dreams that there has been a division of status as between those who continue in the family. The observation of Bashyam Aiyangar, J. (who as the leading vakil in Southern India for several years had an intimate knowledge of the details of the joint family system) that "according to usage and custom (in this Presidency) the remaining members of an undivided family from which one or more alone have become divided, continue as an undivided family in its normal state" is obvious to any body who has any knowledge of the joint family in Southern India. The legal effect of separation of one member of the family on the status of the rest was considered by Mr. Justice Bhashyam Aiyangar in *Sudarasanam Maistri* v. *Narasimhalu Maistri*, [1] and the following observations show the state of the law in this

1. (1901) I. L. R. 25 M. 149.

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Presidency prior to the decision of the Privy Council in *Balabux Ladhuram* v. *Rukhmabai*. [1]. "So far as this Presidency is concerned, though there is no reported decision bearing directly on the point, (*Peddayya* v. *Ramalingam* [2] dictum at page 408) the principle generally recognised and acted upon is that though there can be no compulsory partial partition either in respect of the joint property belonging to the family, or in respect of the persons constituting the undivided family, yet by mutual agreement of parties the partition can be partial either in respect of the property or of the persons constituting the family. And according to usage and custom the remaining members of an undivided family from which one or more alone have become divided, continue as an undivided family in its normal state and not as members, who after part tion have become re-united".

The question is how far the law as laid down in the above passage has been modified by the decisions of the Privy Council in *Ram Pershad Singh* v. *Lakhpati Koer*, [3] and *Balabux Ladhuram* v. *Rukhmabai* [1]. The question raised in the former case was whether the separation of one member *ipso facto* effects a separation between all the others and all that was decided in this case was that there is no presumption, where one member takes his share and separates himself, that the other members remain joint and that the question as regards the other members is one of fact to be decided from their conduct. In *Balabux* v. *Rukhmabai* [1] their Lordships of the Privy Council were of opinion that in cases where the shares of all co-parceners are fixed and determined with a view of ascertaining the share of the out-going co-parcener the separation of one co-parcener is a virtual separation of all, and that if the other members set up that they are joint they must prove re-union. The effect of the decision of the Privy Council in *Balabux* v. *Rukhmabai* [1] was considered in *Ranganatha Rao* v. *Naraynasawmi Naiker* [4], where it was held that there is no presumption of a general division among all the members of coparcenery from the fact that one of its membes has separated and in *Rangasami Naidu* v. *Sundararajulu Naidu* [5] where it was held that there was no presumption that the separation of one

1. (1903) L. R. 30 I. A. 130.
2. (1887) I. L. R. 11 M. 406.
3. (1902) 30 C. 231 ; L. R. 30 I. A. 1.
4. (1908) I. L. R. 31 M. 499.
5. (1916) 31 M. L. J. 472.

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member by itself effected a separation of the rest. The observations of Srinivasa Aiyangar, J., at page 475, set out the position of the co-parceners in such cases. In *Durga Dai* v. *Balmakund*, [1], it was held that where an award in effecting a partition allotted a share to an uncle and the remaining shares to his two nephews the presumption was that they took it as joint property as there was no indication in the award that they should take the half in separate shares.

It seems to me that where a partition takes place under a decree of Court whereby one member claims his share and obtains it, the effect of the decree on the remaining co-parceners must be determined by the terms of the decree, or where it is ambiguous by the scope of the suit. If the suit is one for general partition (in which case it is necessary to determine the shares of all the members and to grant reliefs to all of them and the decree declares the shares of all the members in the items of family property, there will be a severance of status, so far as the members are concerned, and if the others, in spite of the decree, continue to remain joint, it can only be under an agreement, express or implied, to re-unite. But where from the scope of plaint or pleadings all that appears is that one member of an undivided family wanted to cut himself off from the rest after receiving his share and the other members neither asked nor evinced any desire for a partition *inter-se*, the consideration of the shares of the others is only incidental for the purpose of giving the relief which the plaintiff wants (as it is not possible to arrive at the share of one co-parcener without knowing how many co-parceners there are and their shares) and the status of the others is unaffected by the decree in favour of one member. In such cases there seems to me to be no necessity to import the doctrine of re-union for the purpose of considering the status of those who never intended to separate. It is unnecessary to import the fiction of re-union after having had recourse to another fiction of separation because as pointed out by Bhashyam Aiyangar, J. the reunited shares of reunited brothers and after-acquired joint properties are not on the same footing as the joint family property of a normal undivided family. See *Ramasami* v. *Venkatesam* [2] and the observations of Srinivasa Aiyangar, J. in *Rangasami Naidu* v. *Sundararajulu Naidu* [3].

1. (1906) I. L. R. 29 A. 93.
2. (1893) I. L. R. 16 Mad. 440.
3. (1916) 31 M. L. J. 472.

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Moreover, under the Mitakshara it is only certain specified relations that can re-unite. I think it is hard upon the remaining co-parceners who never intended to separate to alter their position by importing the doctrine of re-union and prejudice their position materially simply because one member of the family chooses to separate himself from the family by receiving his share.

Turning to the facts of the present case it appears to me that Exhibits E and F do not effect a general partition or declare the rights of the other co-parceners *inter se*. The suit was by one of the co-parceners for his fifth share and what is significant is that in the suit for partition the only defendant was the only member of the eldest branch, and one who was described in the decree of the Sudder Court (Exhibit D) as the head of the family and the manager of the joint estate. The proceedings went on on the footing that he represented his co-parceners. The decree of the original court did not declare the shares of the others *inter se* but simply gave the plaintiff his one-fifth share. The Sudder Court affirmed the decree of the Civil Judge and in doing so treated the defendant as representing the other co-parceners. Under these circumstances I do not think the present case falls within the decisions in *Ram Pershad Singh* v. *Lakhpati Koer* [1] and *Balabux* v. *Rukmabai* [2]. I am therefore of opinion that the great-grandfather of the plaintiffs did not become divided in status from his elder brother and the decision of the District Judge on this point is correct.

I shall now deal with the next point as to the binding nature of the compromise entered into by the plaintiff's father.

The District Judge has considered the evidence and the probabilities in paragraphs 24 to 58 of his judgment. He has gone into the matter with great care and has fully set out the circumstances which show beyond doubt that there has been bribery and corruption so far as two out of the three arbitrators are concerned and an utter disregard of the present plaintiffs' interests, advantage being taken of the incapacity of their father who is a drunkard and debauchee and was in needy circumstances. I have no hesitation in holding that the view taken by the District Judge is correct.

The award and compromise were in an interpleader suit filed by the Collector on the death of the last descendant of the eldest

1. (1902) I. L. R. 30 Cal. 231. 2. (1903) I. L. R. 30 C. 725.

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branch while the estate was under the management of the Court of Wards. All the persons who claimed an interest in the estate were made parties to this suit. The sister of the last surviving member of the first branch was the 11th defendant in the interpleader suit and she set up that her son was adopted by the deceased Ponnusami Maniagar. The father of the present plaintiffs was the 8th defendant in that suit and his two uncles were the 2nd and 3rd defendants. After written statements were filed and before the case was heard, the parties agreed to refer the matter in dispute to the arbitration of three persons. One of them was the Zemindar of Perayur (22nd defendant) who admittedly was deeply in debt, the other a money-lender Nattukottai Chetti, the 23rd defendant, and the third was one Ganapathi Aiyar, a manager of the estate of a minor whose guardian was the Zemindar. The Zemindar of Perayur had admittedly entered into an agreement (Exhibit G) with the uncles of the father of the plaintiffs in the present suit (who were the 2nd and 3rd defendants in the interpleader suit) whereby he was to finance the litigation on their behalf and to receive the village of Alagapuri and other benefits referred to in the agreement in addition to the amount spent by him for financing the suit. It is not disputed that after the compromise decree passed in pursuance of the award which he gave as one of the arbitrators he got an assignment of this village and a promissory-note for 13,000 rupees which was to be paid out of the sum of Rs. 13,000 which was in Court as mesne profits. It is clearly proved by Exhibit G that he was deeply interested in the success of the 2nd and 3rd defendants in that suit. If they did not succeed in their contention, he would lose the moneys he spent for financing the suit and also the valuable village and lands agreed to be given to him. After the award was passed he actually got the village of Alagapuri and other lands by the deed of gift (Exhibit P) executed by the 2nd and 3rd defendants and got a sale-deed in his favour of the whole of 2nd defendant's share under the award he gave by the sale-deed (Exhibit U). The other arbitrator Karuppan Chetty admittedly got an agreement from the 11th defendant in the interpleader suit who is the 21st defendant in the present suit to act as her agent in the litigation and finance her and subsequently got an agreement (Exhibit JJ.), from the 1st defendant agreeing to finance him. After the award the 6th defendant who got a share in this compromise brought about with the help of the arbitrators executed Exhibit Q,

a mortgage for 24,000 rupees on the same date as Exhibit P which the District Judge rightly thinks was propably a bribe to him. It appears from the recitals in Exhibit P that he had also agreed to finance the 6th defendant. It is also proved that the husband of the sister of the last male holder executed a promissory note for Rupees 5,000 (Exhibit DD) to one Narayanasami Chetti a few days before the reference to arbitration the money payable being really intended to go to the two arbitrators.

So far as the award is concerned, it was not seriously pressed before us by the learned Advocate-General as one which any Court could act upon. It is abundantly clear from the evidence that while a show was being made of deciding matters referred to them by the arbitrators there were contemporaneous attempts in which at least two of the arbitrators took a prominent part by which they wanted to bring about a settlement between some of the parties to the suit behind the back of and prejudicial to the 1st defendant (the father of the plaintiffs) and that even before the award was given the arrangement evidenced by Exhibit J had been brought about with the help of the arbitrators. According to the arrangement Exhibit J which is dated the 12th November 1900, the father of the plaintiffs was entirely cut out and the estate was divided between the 2nd and 3rd defendants in the present suit (who were the 2nd and 3rd defendants in the interpleader suit), the 6th defendant (grandson of the third son of the propositus) the 9th defendant (grandson of the 7th defendant) and the 21st defendant (the sister of the last holder). It is not pretended that the 21st defendant who is the sister of Ponnusami Maniagar had any right under the Hindu Law to any share. She set up an adoption of her son but no attempt was made to prove the adoption at any time and the arbitrators found that the adoption was invalid. Though the award declared that the 2nd and 3rd defendants were the persons entitled to the Zemindari and that in consequence of an arrangement between them the 2nd defendant who got an assignment from the 3rd defendant was solely entitled, it is significant that in the arrangement (Exhibit J) which was handed to the arbitrators before they gave their award and which I have no doubt was brought about through the active mediation of at least two of the arbitrators the second defendant who was entitled to the whole estate agreed to share it with the present 3rd, 6th, 9th and 21st defendants. It is impossible to believe that

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the 2nd defendant who on the 11th November got the entire estate under the award and would the next day have agreed to give up three-fourths of it to those whom the award declared to be not entitled to anything and I have little hesitation in holding that the award and the settlement (Exhibit J) were parts of one design whereby under a show of *bona fide* litigation and compromise the arbitrators really wanted to help the parties in whom two of the arbitrators were deeply interested at the expense of others. As there were minors in the interpleader suit there would have been difficulty in getting the Court to sanction the compromise unless it was clearly shown to be for the benefit of the minors; but under the guise of a reference to arbitration and an award passed in favour of one of the parties who was a major and under an arrangement whereby the party benefitted was generous enough to share it with those who had no interest, everything would have appeared *bona fide*. I have no hesitation in agreeing with the District Judge that the whole thing was a fraudulent scheme to bring into existence an award which would on its face preclude the Court from going into the merits of the case and to supplement it by an arrangement which divided the spoil—the two arbitrators getting good share and those in whom they were interested dividing the rest. If the matter stood here, there would have been little difficulty in the plaintiffs' way; but it is sought to make them bound by the compromise in these proceedings because their father subsequently entered into another compromise whereby on the basis of the award and previous compromise he received a small share in the estate out of the share given to 2nd defendant. It is therefore necessary to see how far the father's action can bind the sons. So far as the plaintiff's father is concerned, he is shown to be a drunkard and debauchee who took no interest in his sons. Far from being in a position to protect the interests of his children he was hardly able to protect his own interest. He was a minor at the date of the interpleader suit which was filed in 1899 (C. S. 63 of 1899). As the compromise to which he was a party was entered into on 30th November 1900 he must have just emerged out of minority. He evidently began his career of vice early in life. He took no steps to appear before the arbitrators and adduce any evidence in support of his case. He left the conduct of the business first to one agent Umayurbagam Pillai under a power of attorney (Exhibit HH) and subsequently to another agent

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Ramaswami Ayyar under Exhibit JJ. The District Judge finds that both these agents played him false and colluded with those whose interests were adverse to his and the evidence and probabilities strongly support this view. The result of the incapacity of the 1st defendant and the fraud of his agents was that an award obtained by some of the parties to the suit by fraud and corruption and a compromise (Exhibit J) entered into (even before the award was passed) with the help at least of two of the arbitrators were filed in Court which completely cut out the 1st defendant. He then filed the petition (Exhibit GG) through a vakil praying that the award should not be enforced as the arbitrators were guilty of misconduct and had entered into agreements with two of the persons interested in the litigation. His brother-in-law states that 1st defendant filed the objection to the award after consulting him and that after it was filed, he (1st defendant's brother-in-law) had to go to Madras and that, during his absence the 1st defendant was cajoled into withdrawing the objection and consenting to a compromise. The probabilities support the evidence on the point. On the day when his objections came on for trial, he put in another application through another vakil (Exhibit XXII) stating that he had effected a compromise with the 2nd and 3rd defendants agreeing to receive "some properties" and that his objections need not be considered. The arrangement which he says he entered into is embodied in Exhibit K, dated 30th November 1900. The result of this arrangement was that the village of Alagapuri which was of considerable value and an important item of property, a sum of Rs. 13,000, the property given to the 6th and 9th defendants and the property given to the 21st defendant who on the face of the award had no interest were excluded from the partition and the plaintiff's father got a twelfth share.

A compromise whereby a considerable portion of joint family property has been excluded from partition and given to persons who have no legal claim whatever, cannot, in my opinion, be binding upon the minors simply because their father was a party to it. It has been held by the Privy Council in *Ramakishore Kedarnath* v. *Jainarayan Ramrachapal* [1] that although a partition entered into by a father may in certain circumstances bind his minor sons, yet it may be impeached if on partition a share is given to an absolute stranger unless it can be supported as a

1. I. L. R. 40 Cal. 966.

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bona fide compromise of a disputed claim. It is alleged that what was given to the 21st defendant was really given to the alleged adopted son but it is clear that, although an adoption was alleged, no attempt was made at any stage of the proceedings to adduce any evidence in support of the adoption and I find it difficult to see how there was any *bona fide* dispute as regards any adoption. In the first compromise (Exhibit J) the share allotted to the 21st defendant is not alleged to be a share given to her as the adoptive mother or in compromise of any claim put forward by the adopted son but it is said to be given to her on account of her relationship with the last holder even though such relationship would not in law entitle her to any portion of the estate. The agreement to give up one-fourth of the estate to one who had no right to it under the Hindu Law could not therefore bind the sons of the 1st defendant even assuming that the 1st defendant entered into the compromise with his eyes open. It it no doubt true that courts will be slow to upset family arrangements if the arrangement was a *bona fide* one, but where we find as in this case the father of the minors to be a drunkard and debauchee incapable of protecting his own interests and in the hands of agents who in fraud of their principal were acting in the interests of persons who were hostile to him and where a very large portion of joint family property was given to persons who had absolutely no claim, one of them receiving a village as a bribe and the other a fourth share in the estate, courts will be slow in characterising the arrangement as a *bona fide* compromise which would bind the minors. It is significant that although the 1st defendant had a respectable vakil, the arrangement evidenced by Exhibit K, was entered into without any consultation with him and without taking any legal opinion as to the legal rights of the parties. Stress has been laid on the fact that the compromise was signed by the vakil but all that his evidence shows is that he was simply asked to put in the compromise petition. He seems to have been kept in the dark as to the various arrangements which the arbitrators had entered into for benefitting themselves. The objection to the award was not filed by him but by another vakil Mr. Rangachari and all that he appears to have done is to have been present in court when the 8th defendant appeared and stated that he wanted to withdraw the application objecting to the award. The presence of the

vakil in court or the fact that he signed the petition withdrawing the objection (the petition being required by the rules to be signed by the pleader) do not advance the case very much.

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I am of opinion that the award and the compromise entered into do not bind the plaintiffs and dismiss this appeal with costs of 1st and 2nd respondents and 5th to 7th respondents.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—THE HON'BLE THE CHIEF JUSTICE AND MR. JUSTICE KUMARASWMI SASTRI.

Kandasami Pillai .... *Appellant**

v.

Muthuvenkatachala Maniagar and others ... *Respondents (Plaintiffs and Defts.)*

Government of India Act, 1915, *S.* 101 (2)—*Proviso to—Object and effect of—Governor-General in Council—Power to appoint additional Judges—Appointments from time to time for periods not exceeding two years—Validity.*

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The object of the proviso to S. 101 (2) of the Government of India Act, 1915, clearly was to provide for occasions when the permanent strength of the High Court is unable to cope with the work for disposal, but the work is not sufficient to justify the appointment of another permanent Judge, by enabling additional Judges to be appointed from time to time for such fixed periods not exceeding two years as may be found necessary The proviso must therefore be read as meaning that appointments may be made from time to time for such period, not exceeding two years, as may be required from time to time on each occasion when the power is exercised

Appeals Nos. 219 and 220 of 1909 against the preliminary decree dated 23rd April 1909 of the District Court of Madura in O. S. No. 42 of 1908 and A. S. No. 244 of 1909 preferred against the decree of the District Court of Madura in O. S. No. 41 of 1908.

N. R. K. Thathachariar for Appellants.

T. R. Ramachandra Aiyar, *B. Sitarama Rao* and *S. R. Muthuswami Aiyar* for Respondents.

The Court delivered the following

Judgment:—A preliminary objection has been taken to the hearing of Appeal No. 220 of 1909 that the court is not legally constituted. By the proviso to Section 101 (2) of the Government of India Act, 1915, the Governor-General in Council is empowered

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* A. S. Nos. 219, 220 and 244 of 1908. 29th August, 1917.

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to appoint persons to act as Additional Judges of any High Court, for such period, not exceeding two years, as may be required, and this is subject to the further provision that the maximum number of the Judges of a High Court shall be twenty. The Act which is a consolidating one reproduces in this proviso the provisions of the Indian High Courts Act, 1911 (1 and 2 Geo. V. Ch. 18). Reading the proviso with Sec. 32 of the Interpretation Act of 1889, it is admitted that the power conferred may be exercised by the Governor-General in Council from time to time, but it is said that as regards each High Court, appointments can only be made for periods not exceeding two years in all, however much they may be required subsequently. That would be a very singular provision in a permanent enactment and, if it has been intended, would certainly have been expressed differently. The ordinary Judges who are appointed by the Crown hold the office at the pleasure of the Crown and form the permanent strength of the Court. The object of the measure clearly was to provide for occasions when the permanent strength of the court is unable to cope with the work for disposal, but the work is not sufficient to justify the appointment of another permanent Judge, by enabling additional Judges to be appointed from time to time for such fixed periods not exceedidg two years as may be found necessary. It has been said to be the duty of the court "to make such construction of a statute as shall suppress the mischief and advance the remedy," *Heydon's case* [1] and it is not necessary to strain the language of the statute in order to do so in this case. We cannot adopt a construction which would defeat the intention of the legislature and soon render this statutory provision inapplicable when most needed, merely because the power of appointing additional Judges is vested in His Excellency the Governor-General in Council and not in His Majesty, or because it is said that conceivably the power conferred might be abused. The proviso must be read as meaning that appointments may be made from time to time for such period, not exceeding two years, as may be required from time to time on each occasion when the power is exercised. The language and the policy of the Act are clear, and it is unnecessary to rely on the fact that this construction was repeatedly acted on under the Act of 1911, as must have been perfectly well-known to those responsible from the consolidating Act which reproduced its provisions. The objection therefore,

1. (1584) 3 Co. Rep. 7 A.=76 Eng Rep. 637.

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assuming it to arise on the facts, affords us no ground for declining to hear the appeal.

On the merits, we see no reason to differ from the conclusion arrived at by the District Judge. We have dealt with the facts fully in our judgment on the main appeal in *Palaniammal* v. *Muthuvenkatachala Maniagarar* [1]. The appellant in Appeal Nos. 219 and 244 of 1909 claims under a deed of mortgage Ex. XV for Rs. 600 executed by the 1st defendant for himself and as guardian of his minor son. The money is said to have been borrowed to pay one Umayurbagam Pillay who was 1st defendant's agent under the power of Attorney, Ex. HH. We see no reason to differ from the findings of the District Judge based on a careful consideration of the evidence that the agent who was guilty of gross breach of duty to his principal did not spend any moneys and that the mortgage Ex. XV executed in favour of his relation (a Vakil's Gumastha) was not supported by consideration. As regards the appellant in A. S. No 220 of 1909, he has been found to have made common cause with the 21st defendant in the interpleader suit whose interest was adverse to those of his principal the 1st defendant. The District Judge has gone fully into the conduct of the appellant in paragraphs 67 and 68 of his judgment and we see no reason to differ from him. Owing to his breach of duty, we do not think he is entitled to recover anything even assuming that money is due to him for work done as agent.

The appeals fail and are dimissed with costs in A.S. Nos. 219 and 220 of 1909 and without costs in A. S. No. 244 of 1909.

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1. (1917) 33 M. L. J. 759.

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Arbitration—Reference—Agreement to refer—Subsequent suit on the same subject-matter—Award pending suit—No power to Court to pass a decree in accordance with the terms of the award—*See* Civil Pro. Code, Sch. ii paras 18 and 22 177

Assignment—*Unregistered voluntary association—Fund subscribed by member—Bonus—Member's right to nominate beneficiary in accordance with rules—Rights of nominee.*

Lucia Fernandez was a member of the Roman Catholic Provident Fund, an unregistered voluntary association managed by a committee, having for its object the making of provision for the family of deceased members out of the funds of the society, in accordance with its rules. Lucia Fernandez was given a "policy" by which the society undertook to pay a certain sum called "bonus" to the person named in her latest nominee list and in the absence of such a person, to her legal heirs. According to the rules of the society, the policy was not assignable and a member could only nominate the wife or husband as the case may be, and children, unless the managing committee expressly permitted the nomination of any other person. The nomination list might be changed by a new nomination, but the change must be sanctioned by the committee before it became operative and in any case, the revoked nomination list of which the member retained a duplicate, must in all cases be surrendered to the fund and sent along with the new nominee list. The duplicate nomination list was looked upon as something like debenture. In 1904 Lucia Fernandez with the sanction of the committee nominated the first defendant and it was agreed between them that the bonus should belong to the latter and the policy and the duplicate of the nomination list were delivered to the first defendant. Thereafter the first defendant paid the subscription or calls due by Lucia Fernandez. In 1908 Lucia Fernandez attempted to revoke the nomination of the first defendant and substitute the plaintiff, her elder son as beneficiary. She was unable to return the previous nomination list and the committee after inquiry declined to sanction the new nomination. On 6—5—1910, a few days before her death, she purported to bequeath the bonus to plaintiff who obtained probate of the will and sued as representative of Lucia Fernandez for the bonus. The Fund deposited the money in Court.

Assignment—*Contd.* PAGE

Held, that the bonus belonged to the first defendant and that the plaintiff's suit was liable to be dismissed. If under the contract between the member and the society, the society undertakes to pay a particular person, that person is entitled to the money, though the member may have the power to select any person he chooses and though the nomination may be ambulatory in character so as to enable the member at his entire discretion to change the nomination or even to make the fund his own by merely observing the formalities prescribed by the rules. Further, the nomination paper signed by Lucia Fernandez might amount to an assignment of the bonus intended to operate as such.

Florina Marties v. *Pinto* (*Abdur Rahim and Srinivasa Aiyangar, JJ*) 476

Benefit Society—Unregistered voluntary association—Fund subscribed by member—Bonus—Member's right to nominate beneficiary in accordance with rules—Rights of nominee—*See* Assignment ... 476

Charge—Creation of—Charge to secure a liability which might arise in the future, validity of—*See* Transfer of Property Act, S. 100. ... 58

Christian Marriage Act (XV of 1872), S. 68—*Offence under—What constitutes—Hindu by religion performing marriage according to Hindu mode between persons either of whom is a Christian, if guilty.*

A Hindu by religion performing a marriage according to the Hindu mode between two persons either of whom is a Christian commits an offence under S. 68 of the Christian Marriage Act, XV of 1872.

6 M H. C. R. App. XX. ; *Queen-Empress* v. *Yohan* (1892) I L. R. 17 M. 392, approved.

Kolandai Velu v. *Rev. Dequidt.* (*Chief Justice, Oldfield and Kumaraswami Sastri, JJ.*) F. B 113

Civil Procedure Code (1882) Ss. 365, 366, 368, 371—Substitution of parties in miscellaneous appeal—Sufficient for all stages of a suit. *See* Limitation Act, S 5 483

Civil Procedure Code (V of 1908) S. 11—*Explanation V, and O. 20, R. 12—Suit for possession and mesne profits—Decree silent regarding claim for future mesne profits—Fresh suit for such profits, not barred.*

Where after a suit for possession of lands and mesne profits past and future, had been brought and decided and a decree had been obtained for possession and past mesne profits without the claim to future mesne profits being decided, a second suit was brought to recover mesne profits from the institution of the first suit till delivery of possession.

Held, by *Wallis*, C. J. and *Kumaraswami Sastri*, J. (*Ayling*, J. dissenting) that the second suit was maintainable. *Ramaswami Aiyar* v. *Sri Rangaraja Aiyangar* (1914) 2 L. W. 8. dissented from.

Doraiswami Aiyar v. *Subramania Aiyar.* (*The Chief Justice, Ayling and Kumaraswami Sastri, JJ.*) (*F. B.*) 699

———S. 11—*Res Judicata between co-defendants—Conditions of applicability of doctrine—Decree in spite of a finding—Finding if and when res judicata — Unnecessary finding when res judicata —Evidence Act, S. 115—Estoppel—A unnecessarily made party to the suit—A insisting on continuing on record and raising pleas as against co-defendant — Co-defendant praying for A's removal from record on ground of being unnecessary party—Court not removing him and deciding issues as between them after taking evidence—A not estopped from pleading incorrectness of decision in subsequent suit between himself and his co-defendant.*

C. P. Code—*Contd.* PAGE

In a suit by A against her brother and brother's sons for the recovery of certain immoveable property to which she claimed title under deeds of sale and gift from her brother, the question arose whether the defendants were precluded by reason of the decision in a prior suit (O. S. 232 of 1910) from raising the pleas that the deeds relied upon by A represented only sham transactions and that they (defendants) had a good title by adverse possession for the statutory period. O. S. 232 of 1910 was a suit for sale upon a mortgage bond executed by A and was brought against A and her brother and brother's sons. In that suit A contended that the bond sued on represented a sham transaction devoid of consideration and that her brother and her brother's sons were unnecessary parties inasmuch as they claimed under a title adverse to herself and the mortgagee. Her brother and her brother's sons however insisted on continuing on the record and raised the same pleas as those raised by them in the subsequent suit. The Courts found that the mortgage bond sued upon represented a sham transaction, that the deeds of sale, and gift relied upon by A represented real transactions and that A's brother and brother's sons had not a good title by adverse possession for the statutory period; they accordingly dismissed the suit.

Held, (1) that the findings in O. S. 232 of 1910, that the deeds relied upon by A represented real transactions and that her brother and her brother's sons had not acquired title by adverse possession were not *res-judicata* inasmuch as, in view of the finding as to the bond sued on, the suit would have been dismissed even if the findings on the other issues had been the other way ; (2) that the defendants were not estopped from saying that the decision in the prior suit on the points at issue was wrong by reason of their having in that suit invited a decision upon them, and the mere fact that A was led to adduce evidence in the former case to substantiate her position was not enough to show that she was prejudiced or induced to change her position by the defendant's inconsistent conduct within the meaning of S. 115 of the Evidence Act.

Per Spencer and Seshagiri Aiyar, JJ. :—For the decision in a suit to operate as *res judicata* between co-defendants therein, it is necessary (1) that there should be active controversy between the co-defendants and (2) that an adjudication *inter se* between the co-defendants should be necessary to give the appropriate relief to the plaintiff.

Per Seshagiri Aiyar, J. :—*Quaere* whether, in order that the decision in a suit may operate as *res judicata* between co-defendants therein, it is also necessary that there should be an express adjudication and not merely one which may either be inferred or be deemed to have been granted or refused without further argument

Jadab Chandra Sirkar v. *Kailash Chandra Singh* (1916) 21 C. W. N. 693, referred to.

Although a finding may be unnecessary, yet if it is embodied in the decree it will be *res judicata.*

Secretary of State v. *Swaminadha Koundan* (1911) I. L R. 37 M. 25 =21 M. L. J. 648. referred to.

Sankaramahalingam Chetty v. *Muthulakshmi.* (*Spencer and Seshagiri Aiyar, JJ.*) 740

———S. 37 (b)—Transfer of territorial Jurisdiction—Transfer of pending proceedings by operation of Law—*See* C.P. Code, O. 21, R. 8 ... 750

———S. 48—Combined decree in mortgage suit—Application for realising balance of mortgage money personally—Starting point from the

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date when remedy against the mortgaged properties exhausted. *See* Mortgage 543

——S. 63—*Execution sale by inferior Court during pendency of attachment by superior Court—Sale valid.*

The Court of the District Munsif of C. attached and brought to sale certain property during the pendency of an attachment of the same property by the Court of the Subordinate Judge of C. It was found that the purchaser at the execution sale had notice of the prior attachment by the Court of the Subordinate Judge.

Held, that the sale was valid and that the proceedings of the inferior Court were neither illegal nor without jurisdiction.

Narayanan Nambudripad v. *Megaji Sait.* (*Ayling and Seshagiri Aiyar, JJ.*) 217

——S. 64—*Explanation—Application for rateable distribution by non-attaching decree holder—Private alienation by judgment-debtor, if valid.*

Non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise, are not entitled to avoid a private alienation by the judgment-debtor made during the continuance of such attachment.

Mina Kumari Bibi v. *Bijoy Singh Dudhuria* (1917) I. L. R 44, C. 662=32 M. L J. 425 relied upon.

Annamalai Chettiar v. *Palamalai Pillai.* (*The Chief Justice, Ayling and Kumaraswami Sastri. JJ.*) (*F. B*) 707

——S. 110 *Leave to appeal to His Majesty in Council—Dispute regarding irrigation rights—Valuation—Substantial question of law.*

The subject-matter in dispute in the case was the right of the plaintiffs to use the water of a pond and a channel for the irrigation of their lands. It was contended for the applicant for leave to appeal to His Majesty in Council, that the application fulfilled the requirements of the three paragraphs of S. 110 of the C. P. Code.

Held that, though the suit, framed as one for a declaration and an injunction had been valued for purposes of jurisdiction at Rs. 800, the real value of such a right could properly be ascertained only on the basis of the detriment or injury which the plaintiffs would suffer if that right were negatived. The extent of the injury having been found to be negligible so far as pecuniary value was concerned, the application did not fulfil the requirements of the first paragraph of S. 110 of the C. P. Code.

Per *Sadasiva Aiyar, J.* The word 'property' in the second paragraph of S. 110 means rights in property inferior to full ownership where such inferior rights alone are the subject-matter in dispute. The suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards

Per *Spencer, J.* The claim must be one "to or respecting property" of Rs. 10,000 in value, not a claim merely affecting property of such value.

Where the questions of law involved in a case had been settled by previous decisions of the Privy Council and where the High Court had merely to apply the law to the facts of the case, there could be no

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substantial point of law of general interest so as to justify the grant of leave to appeal to His Majesty in Council
Appala Raja v. *Rangappa Naicker*. (*Sadasiva Aiyar and Spencer, JJ.*) 481
——S. 115—"Case," Meaning of—Proceedings under S. 10 of the Rel. Endowments Act—Revision by High Court—*See* Rel. End. Act Ss. 7, 8, 9, 10 and 14 69
——S. 115.—Order to be revised manifestly illegal but good on the merits—Interference in revision—*See* Small Cause Court. ... 539
——O. 1, R. 8.—Suit under by disciples of mutt for setting aside alienation of trust properties by head of mutt—Maintainability—*See* Religious Endowment 357
——O. 9. R. 13.—*Applicability—Ex-parte decree—what is Appearance by pleader requesting for further time—Request not granted and decree passed on materials on record—Application to set aside decree under O. 9, R. 13—Maintainability—Remedy of defendant.*

An old suit, which had been adjourned several times at the instance of defendant and in which a portion of the evidence had been let in, stood posted to the 16th November 1915 and was on that date again adjourned peremptorily to the next day at the instance of defendant. On the 17th, however, defendant himself did not appear and his pleader, who was present and who was the pleader who appeared in the case throughout, asked for further time to get "proper instructions." His application was refused, the suit proceeded with, and after a number of witnesses had been examined for plaintiff, the evidence was closed and judgment was delivered against defendant on a subsequent date. On an application by defendant to set aside the decree on the ground that it was an ex parte decree *held* that (*a*) the decree was not an *ex parte* decree because the request of defendants' pleader on the 17th must be deemed to be one for further time and defendant must therefore be deemed to have appeared with his pleader and (*b*) the proper remedy of defendant was by way of an appeal against the decree and not by an application under, O. 9, R. 13, C. P. Code
Akula Bakkayya v. Aluri Venkatanarasimham (*Abdur Rahim, J*) ... 553
——O. 21, R. 2—Certificate of payment—No form necessary—Application by decree-holder containing admission of part-payment—Saving of limitation—*See* Limitation Act, S 20 and Art. 182 ... 219
——O. 21, R. 8—*Decree—Transmission for execution to District Court—Transfer by it of decree to Sub Court of A for execution—Sale by that Court in execution—Validity—Jurisdiction—Transfer prior to sale of territorial jurisdiction over property to Sub Court of B—Property within territorial jurisdiction of Sub-Court of A at time of transfer of decree—Effect pending proceedings—Effect on, of transfer of territorial jurisdiction over property concerned.*

A decree of the Chief Court of Lower Burma was transmitted for execution to the Dt. Court of Ramnad and was by that Court transferred for execution to the Subordinate Court of Ramnad. In execution of that decree the Subordinate Court of Ramnad sold immoveable property of the judgment-debtor which, at the time of the said sale, was admittedly situated in the territorial jurisdiction of the Subordinate Court of Sivaganga. On objection taken to the jurisdiction of the Subordinate Court of Ramnad to sell the property, *held* that though the transfer of the decree to the Subordinate Court of Ramnad might be valid on the ground

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that the property was on the date of such transfer situated in its territorial jurisdiction, yet the sale by that Court was invalid because on the date thereof it ceased to have territorial jurisdiction over the property.

Meaning of expression "Court of competent jurisdiction" in O. 21, R. 8 of the Code.

Pending proceedings are transferred by operation of law on the occurrence of any change of territorial jurisdiction over the property with which they are concerned.

Viswanathan Chetty v. *Murugappa Chetty.* (*Abdur Rahim and Oldfield, JJ.*) 750

——O. 21, R. 63—*Suit for declaration by unsuccessful claimant—Attaching decree-holder, defendant—Plea that sale was fraudulent under S. 53 of the Transfer of Property Act, if open—Remedy of creditors.*

Where an unsuccessful intervenor in claim proceedings, institutes a suit under O. 21, R. 63 of the C. P. Code for declaration of his title as vendee from the judgment-debtor and for cancellation of the summary order dismissing his claim, it is not open to the judgment-creditor (defendant) to resist the plaintiff's suit on the ground that the sale to the plaintiff was a fraud on the creditors of the vendor, unless the transfer had been previously avoided by the creditor in a properly instituted suit. *Palaniandi Chetty* v. *Appavu Chettiar* [1] (1916) 30 M. L J. 565 approved.

Subramania Aiyar v. *Muthia Chettiar* (*Ayling, Seshagiri Aiyar and Bakewell, JJ*) F. B. 705

——O 21, R. 63—Suit under—Claimant perfecting title to property by adverse possession after the attachment—Adverse possession, interruption of—*See* Transfer of Property Act, S. 98 316

——O. 23, R. 1—*Withdrawal of suit—Hindu Law—Widow—Suit by the nearest reversioner to challenge an alienation by the widow—Suit withdrawn—Right of the succeeding reversioner to challenge the alienation by suit, whether barred.*

Where a Hindu daughter sued for a declaration that an alienation made by the widow was not binding on her and the suit is withdrawn without obtaining permission to institute another suit, the right of the succeeding reversioner (daughter's son) to challenge the alienation by another suit is not barred by reason of such withdrawal.

If a suit by one reversioner has been dismissed for default or withdrawn without ever being tried on the merits, a suit by another reversioner challenging the improper alienation is not barred. *Venkatanarayana Pillai* v. *Subbammal* (1915) I. L. R 38 M. 406 at 410 and *Janaki Ammal* v. *Narayanaswami Aiyar*, (1916) I. L. R 39 M. 634 Expl.

Ramalinga Mudali v. *Arumuga Mudali* (*Abdur Rahim* and *Kumaraswami Sastri, JJ.*) 471

——O. 33, R. 5 (d)—"*Cause of action*"—*Meaning—Application to sue in* forma pauperis—*Dismissal on ground of claim being barred by limitation—Jurisdiction—Limitation Act, Art. 97—Applicability—Contract with Municipality for collection of rents of stalls—Deposit in pursuance of—Contract falling through—Suit for recovery of deposit or of balance thereof—Limitation—Starting point.*

The expression "cause of action" in O. 33, R. 5 (d) of the code signifies a subsisting cause of action and courts have power to dismiss an application to sue in *forma pauperis* on the ground that the cause of action is incapable of enforcement under the rules of limitation.

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"Cause of action" means a "good subsisting cause of action" only in the sense of a valid subsisting cause of action, *i. e.*, one not barred by the laws of jurisdiction or limitation. It does not mean a "good subsisting cause of action" in the sense of a good *prima facie* case on the merits.

A suit for the recovery of the sum deposited by the plaintiff upon a contract with a Municipality for the collection of rents of stalls in a vegetable market or for the recovery of at least the balance due to the plaintiff after crediting a portion of the sum so deposited towards the monthly instalments of rent due from him. is governed by the period of limitation prescribed by Art. 97 of the Limitation Act and must be instituted within 3 years from the date of the contract falling through.

Govindaswami Pillai v. *The Municipal Council of Kumbakonam* (*Spencer, J.*) 577

———**O. 34, R. 6**—"*The plaintiff*" *whether includes a first mortgagee, defendant who is given liberty under the decree to apply for sale of the mortgaged properties—Transfer of Property Act, S. 90—Decree for sale of the mortgaged properties passed by one Court—Decree transferred to another Court for execution—Whether the latter Court can pass a personal decree.*

Where in a suit by the 2nd mortgagees against the mortgagor and the 1st mortgagees, a decree was passed by which the puisne mortgagees as well as the first mortgagees were declared entitled to apply for the sale of the mortgaged properties, the first mortgagees though arrayed as defendants can apply for a personal decree under O. 34, R. 6 of the Civil Procedure Code. The intention of the Court in passing such a decree was to treat both the mortgagees as plaintiffs and to enable them to obtain all the further reliefs in that capacity.

Where a decree for the sale of the mortgaged properties is transmitted to another Court for execution, such Court has no power to pass a personal decree under S. 90 of the Transfer of Property Act.

The power of passing a supplementary decree in the suit after a judicial determination of the question of the liability of the mortgagor is only with the Court in which the mortgage suit was instituted. Observations of Sir Bashyam Aiyangar, J, in *Mallikarjunadu* v. *Linga Murthi*, (1902) I. L. R. 25 M. 244 at 237 dissented from.

Tirumalai Kadirveluswami Naicker v. *The Eastern Development Corporation, Ltd.* (*Seshagiri Aiyar and Bakewelll, JJ.*) 382

———**O. 39, R. 2**—*Temporary injunction in mandatory from—Issue of—Jurisdiction—Specific Relief Act, S. 53—Effect.*

By virtue of O. 39, R 2 of the Code of Civil Procedure, Courts in this country have the power to issue temporary injunctions in mandatory form.

Opinion of Beaman, J., in *Rasul Karim* v. *Prubhai Amirbhai* (1914) I L R. 38 B. 383 dissented from. *Champsey Bhimji & Co* v. *JumnaFlour Mills* Co. (1914) 16 Bom. L.R. 566 *Israil* v. *Shamser Rahman* (1918) I. L. R 41 C. 436 referred to.

On the merits their Lordships held that the case was not a fit one for the issue of a temporary injunction in mandatory form.

Bonner v. *Great Western Railway* Co. (1883) L.R. 24 Ch. D. 1 followed.

Kandaswami Chetty v. *Subramania Chetty* (*Spencer and Srinivasa Aiyangar, JJ.*) 448

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——— **O. 45, R 15**—*Privy Council—Decree of—Transmission for execution—True copy of order in council filed with application for—Certified copy not filed because it had miscarried—Effect—Construction of Or. 45, R. 15 Principle—High Court—Fee certificate for costs incurred in—Time for filing—High Court decree directing, each party to bear his own costs—Reversal of decree by Privy Council—Effect.*

The provisions of O. 45, R. 15 of the Code of Civil Procedure should not be construed as restricting the only possible evidence of an order of His Majesty in Council to a certified copy thereof, but as directory words with the object of ensuring that the proper information upon the subject of any Order in Council should be supplied to the Courts in India.

Where along with an application for transmission of a decree of the Privy Council for execution a true copy of the order was filed, the certified copy not having reached the petitioner by reason of its having miscarried, *held* the provisions of O 45, R. 15 were sufficiently complied with and that the decree could be transmitted.

Where the High Court ordered by its decree each party to bear his own costs but that decree was reversed by the Privy Council which allowed to the appellant before it his costs incurred in the High Court also, *held*, that a fee certificate filed by the pleader for the appellant in the High Court in respect of fees received by him was not out of time because it was not filed within the seven days allowed by the rules.

Janaki Ammal v. *Narayanaswami Aiyar.* (*Abdur Rahim and Napier, JJ.*) 400

——— **Sch. II paras 18, 22**—*Specific Relief Act, S. 21—Agreement to refer disputes to certain arbitrators—Subsequent suit on the same subject matter—Award pending the suit—Validity of—Whether Court can pass a decree in accordance with the award.*

Where the parties agreed to refer their disputes to certain arbitrators and for some time nothing was done under the reference and the plaintiff sent a notice revoking the arbitration and subsequently filed a suit ignoring the reference and pending the suit the arbitrators passed the award, the Court cannot pass a decree in accordance with such award. On the filing of the suit, the arbitrators became *functus officio*, consequently their award is *ultra vires* their powers and the Court acts without jurisdiction on passing a decree embodying the terms of the award.

Appavu Rowther v. *Seeni Rowther.* (*Ayling and Seshagiri Aiyar, JJ.*) 177

——— **Sch. II para, 22**—Enactment of, during pendency of reference to arbitration—Rights of parties unaffected—Bar of suit—*See* Specific Relief Act, S. 21. 4

Company—*Winding up—Liability of Secretary to pay to the liquidator the sums belonging to the company in his hands—Legal position of Secretary—Agent and not a trustee—Interest—Liability of Secretary to pay—When arises—Liability of the Legal Representative of the Secretary*

Where a company went into voluntary liquidation and the Secretary had in his hands moneys belonging to the company and the liquidator subsequently made a demand for the moneys and pending a suit for the same with interest the Secretary died and his legal representative was brought on the record, *held*, the Secretary of the company is not a trustee

Company—*Contd.* PAGE

or the amount that he receives on behalf of the company but only an agent.

An agent retaining money which he ought to pay over but which he has not been required to pay is not bound to pay interest on the same from the date of its receipt by him. But when in answer to a demand for the money he denies his liability, from that moment he must be deemed to have retained the money illegally and is bound to pay interest thereon from that moment

The legal representative of the Secretary who has been brought on the record is bound to pay the moneys found to have come into his father's hands.

Ganesa Seturam v. *Ramaswami Servai.* (*Spencer and Seshagiri Aiyar, JJ.*) 468

Companies Act, (VII of 1913) S. 104 (1) (b)—*Allotment of share "as fully paid up otherwise than in cash"—Meaning.*

Where the question was whether an allotment by the Appellant Company of a fully paid up share to a debenture-holder in exchange for his debenture pursuant to a condition in the debenture was or was not an allotment of a share "as fully paid up otherwise than in cash" within the meaning of S. 104 (1) (b) of the Indian Companies Act, 1913 and it appeared that the debenture deed provided. "The registered holder hereof shall while the same remains in force and upon giving previous notice in writing be entitled to surrender this debenture and receive in consideration thereof one fully paid ordinary share of Rs. 100 of the company part of or ranking *pari passu* with the ordinary shares of the original capital. Upon the surrender of this debenture under this condition the holder will not be entitled to proportionate interest thereon and the ordinary share so allotted in exchange shall rank for dividend from and after the half-year in which the registtation is made." *Held* that the share allotted in those circumstances was allotted "as fully paid up othewise than in cash " and therefore came within the provisions of S. 104 (1) (b) of the Act.

Thodapuzha Rubber Co. Ltd. v. The Registrar Joint Stock Companies, Madras. (*The Chief Justice and Oldfield, JJ.*) 474

Contract—Sale of goods—C. I. F. Contract—Goods shipped in German ship—Outbreak of war while steamer was on voyage—Buyer not bound to accept bill of lading. *See* Sale of Goods 410

Contract Act Ss. 16 and 74—*Excessive rate of interest—Relief against, grounds for—' Penalty,' meaning of.*

A promissory note provided for payment, on demand, of the principal sum with interest at about 172 per cent. per annum. In a suit upon the promissory note, the Court below reduced the rate of interest to 24 per cent on the ground that the contract-rate was excessive and extortionate. No evidence was taken in the case and there was no proof of undue influence.

Held, that the court below erred in giving relief merely on the ground that the rate of interest was excessive.

A contract to pay a heavy rate of interest is not, by itself, a penalty so as to be relieved against. Under S. 74 of the Contract Act, for a sum named to be treated as a penalty, it must be an amount to be paid in

Contract—*Contd.* PAGE

case of a breach of the contract (*i. e.,*) breach of an antecedent promise. Cases on the point reviewed.

Ponnusami Naicken v. *Nadimuthu Chetti,* (*Spencer and Srinivasa Aiyangar. JJ.*) 302

——S. 23—*Illegality—Agreement by a client to pay a sum of money to a pleader's clerk for special attention to his case—Agreement opposed to public policy—Void.*

An agreement by which a litigant binds himself to pay a sum of money to his Vakil's clerk for giving special attention to his legal business is opposed to public policy and consequently cannot be enforced.

Suryanarayana v. *Subbayya.* (*The Chief Justice, Ayling and Kumaraswami Sastri, JJ.*) 724

——S. 74—Excessive rate of interest—Contract providing for only one rate of interest throughout—Not a penalty—*See* Contract Act, Ss. 16 and 74 302

Contribution—Suit for, as between partners, if maintainable—*See* Partnership 509

Corporation—Transaction of business—Meeting—Dismissal of free-hold officers by circulation of papers without a meeting—Impropriety of —*See* Religious Endowments 660

Criminal Procedure Code, Ss. 147, 148, and 537—"*Local inquiry" under S. 148—Whether Evidence can be taken by the officer making local inquiry—Duty of the Sub-divisional Magistrate to take further evidence.—Interference under S. 107 of the Government of India Act,* 1915.

Where a Sub-divisional Magistrate directed a local inquiry by a Sub-Magistrate regarding a dispute, as to a right of way and the Sub-Magistrate in such enquiry examined witnesses and submitted his report and the Sub-divisional Magistrate, before whom no objection was taken to the course followed by the Sub-Magistrate, and no further evidence was tendered, passed final orders on the dispute under S. 147 basing his opinion on the report of the Sub-Magistrate, the Sub-divisional Magistrate has not acted without jurisdiction.

Arumuga Govindan v. *Venkatasubbier,* (1907) I. L. R. 31 M. 82 considered.

A local enquiry authorised by S. 148 of the Criminal Procedure Code is not merely a local inspection by the officer but such officer can take evidence in the course of such local enquiry and his report is admissible in the proceedings before the Sub-divisional Magistrate under S. 147.

The receipt of the report of the local inquiry does not absolve the Magistrate acting under S. 147 from taking, any further evidence tendered before him.

Per Seshagiri Aiyar, J.—Where the Sub-divisional Magistrate bases his conclusion on the evidence taken at the local inquiry, the procedure adopted by him is irregular ; but in the absence of any prejudice to the parties, such defect or irregularity of procedure is cured by S. 537 of the Code and the High Court will not interfere under S. 107 of the Govt. of India Act with such a decision.

Muthusami Nadan v. *Kalinga Moopan.* (*Ayling and Seshagiri Aiyar, JJ*), ... 78

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———S. 172—*Police diary—Statements made to Police Officers—Evidence—Practice of the Judicial Committee in Criminal Appeals.*

A diary made by the investigating police officer under S. 172 of the of Criminal Procedure, 1898, may be used under that section to assist the Court which tries the case by suggesting means of further elucidating points which need clearing up, and which are material for the purpose of doing justice between the Crown and the accused, but not as containing entries which can by themselves be taken to be evidence of any date, fact, or statement contained in the diary. The police officer who made the diary may be confronted with it, but not any other witness.

Queen Empress v. *Mannu*, (1897) I. L. R. 19 All. 390 (F. B.) approved.

Held, accordingly, that in deciding an appeal against a death sentence and in confirming that sentence the High Court erred in testing the credibility of the witnesses called at the trial by reference to the statements made by such witnesses to the police and entered in the police diary and in treating what was thus entered as evidence for that purpose.

The general principle is established that the Sovereign in Council does not act, in the exercise of the Prerogative right to review the course of justice in criminal appeals in the free fashion of a fully constituted Court of Criminal Appeal. The exercise of the prerogative takes place only when it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as for example in the admission of improper evidence will not suffice if it has not led to injustice of a grave character Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of Courts below.

Error in procedure may be of a character so grave as to warrant the interference of the Sovereign. Such error may for example deprive a man of a constitutional or statutory right to be tried by a jury, or by some particular tribunal or it may have been carried to such an extent as to cause the outcome of the proceedings to be contrary to fundamental principles which justice requires to be observed. Even if the Judicial Committee think an accused guilty, they will not hesitate to recommend the exercise of the prerogative if such be the case. But where the error consists only in the fact that evidence has been improperly admitted, which was not essential to a result which might have been come to wholly independently of it, the case is different. The dominant question is the broad one whether substantial justice has been done, and if substantial justice has been done, it is contrary to the general practice of the Board to advise the Sovereign to interfere with the result.

Dal Singh v. *The King Emperor*. (*Viscount Haldane.*) ... 555

———S. 195—*Penal Code, S. 199—Sanction for prosecution—Principles regulating the grant of—Reckless statements, not meant to mislead.*

The petitioner, a pleader, obtained a decree and in support of his application to draw out of Court the amount of costs deposited by the defendant, filed an affidavit stating that the property which he gave as security under the direction of the Court, was not subject to an incumbrance in favour of V. When, however, an Amin was sent to make an inquiry and report on the sufficiency of the security, the petitioner

Cr. P. Code—*Contd.* PAGE

admitted that he had made a mistake and that there was an incumbrance in favour of V. On an application for sanction to prosecute the petitioner the District Munsif held that, having regard to the position and character of the petitioner, the nature of the statement made by him and the fact that when the Amin was sent he admitted the mistake, this was not a fit case for prosecution under S. 199, I. P. C. and refused sanction. The District Judge reversed the order of the Munsif holding that since there was a *prima facie* case of making a false statement, all the other circumstances must be left for consideration at the trial.

Held, that in the circumstances of the case the order of the District Judge granting sanction should be set aside.

Per Abdur Rahim, J.:—When sanction is asked for, for the prosecution of a person for making a false statement in the course of a judicial proceeding or for any other offence of a like nature, it is the duty of the Court to which the application is made not only to see there is a *prima facie* case, but also to decide whether it is a fit case for prosecution in the interests of justice. The Court ought not to forget that statements which in fact are false are often made by men through the merest inadvertance or slips of memory.

Per Napier, J. It is not the function of the Court granting the sanction, but only of the Magistrate who hears the case, to decide whether there is a *prima facie* case for prosecution. It is the function of the Court which grants sanction to consider the whole of the circumstances of the case and decide whether it is in the interests of justice and purity of judicial proceedings that the person who has made the statement should be prosecuted.

Aiyasami Aiyar v. *Aiyasami Aiyar* (*Abdur Rahim* and *Napier, JJ*)... 545

———**S. 344**—*Magistrate—Adjournment—Order making payment of costs a condition of adjournment—Validity—Jurisdiction of Magistrate—Charge based on police report—Informant represented at hearing by vakil—Informant joining Police Officer in application for adjournment—Order for adjournment conditioned upon payment of accused's costs by informant—Legality.*

Under S. 344 of the Code of Criminal Procedure, a Magistrate has power to make the payment of costs by one party to another a condition of granting an adjournment.

Where in a case in which the charge before the Magistrate was on a police report, the informant was represented at the hearing and joined in an application for adjournment made by the Police Officer on the ground that his vakil was absent and the Magistrate granted an adjournment on condition of the informant paying to the pleader of the accused his costs of the day, *held* that the Magistrate had jurisdiction to make the order, because the informant was under the circumstances virtually the prosecutor

Sannasi Kudumban v. *Sivasubramania Kone* (*Ayling* and *Napier, JJ.*) 366

———**Ss. 403, 429, 439, and 494.**—*Summons case—Criminal trespass-Charge sheet by police—Withdrawal of prosecution by the Public Prosecutor before service of summons on accused—Complaint by aggrieved person, on the same facts, charging accused with offence under S. 447,*

Cr. P Code—*Contd.* PAGE.

I. P. C.—Autrefois acquit—*Difference of opinion between two judges of the High Court in a Criminal Revision Case—Procedure.*

The police had filed a charge sheet under S. 447, Indian Penal Code against a certain person before a 2nd class Magistrate. A summons was issued but before it was served, the Public Prosecutor with the consent of the Court withdrew from the prosecution under S. 494, Criminal Procedure Code and the accused was then acquitted as required by that section. Thereafter the person on whose land the offence of criminal trespass was alleged to have been committed preferred upon the same facts a complaint charging the accused among other things, with an offence under S. 447, Indian Penal Code. The accused was tried and convicted of that offence.

Held, per *Wallis*, C. *J.* (agreeing with *Abdur Rahim, J.* and dissenting from *Napier, J.*) that the order of acquittal under S 494 Criminal Procedure Code so long as it remained in force, operated as a bar to further proceedings for the same offence and that the trial and conviction were bad in law.

Where two Judges of the High Court differ in a Criminal Revision Case, S. 439 of the Criminal Procedure Code read with S. 429 requires the case to be decided by a third Judge and precludes any further appeal under the Letters Patent or any reference to a Full Bench under the Rules of the Court.

Dudekula Lal Sahib, In re (*Chief Justice*) 121

————Ss. 429 and 439.—Difference of opinion between Judges of a division bench of the High Court—Reference to a third Judge, proper procedure—Reference to Full Bench incompetent—*See* Cr, Pro. Code Ss, 403, 429, 439, and 494 121

————S. 488—*Application by mother for maintenance for her child—Decree of civil courts declaring that the child was not born to the person alleged to be its father—Release of right to maintenance by the mother—Effect of.*

A Magistrate passed an order under S. 488 of the Criminal Procedure Code, directing the petitioner to pay a sum of money every month for the maintenance of a child of which the petitioner was alleged to be the father, in spite of the fact that a competent Civil Court had declared that the child was not born to the petitioner and that the mother of the child who now applied for maintenance on its behalf, had executed a registered release deed in favour of the petitioner giving up the claim to maintenance for consideration of Rs, 200

Held, that the Magistrate ought to have held that the prior decision of the Civil Court was conclusive on the question of the relationship between the child and the petitioner and should have refused to pass any order for maintenance.

Mahomed Abid Kumar Kadar v. *Ludden Sahiba* (1886) I. L. R. 14 C. 276. 2 Weirs Crl, Rulings 614. and 2 Weir's Crl. Rulings 615 ref. *Deraji Malinga Naika* v. *Marati Kaveri*, (1907) I L R 30 M 400 *Ghana Kanta Mohanta* v. *Gereli* (1904) I L R. 32 C 479 *Nur Muhammad* v. *Ayesha Bibi*, (1905) I. L. R. 27 A 483 referred to.

Held further, that the mother having given a registered release deed in favour of the petitioner, giving up the claim for maintenance, she was not entitled to an order for maintenance.

Cr. P Code—*Contd.* PAGE.

Illath Narayanan Moosad v. *Kathil Itticherry Amma.* (*Sadasiva Aiyar and Phillips, JJ*). 449

——S. 494—Criminal trespass—Charge sheet by police—With drawal of prosecution by Public prosecutor before service of summons on accused—*Autrefois acquit*—*See* Crim. Pro. Code Ss 403, 429, 439 and 494 121

Criminal Trial— Adjournment conditional on payment of costs—Propriety of order—*See* Cr. P. Code S. 344 366

Damages—Wrongful dismissal of trustee; from office by members of a Temple committee—Right to damages—*See* Religious Endowments 660

Decree—Execution—Decree of British Indian court—Transmission to Travancore court for execution—Application to British Indian Court for transmission of records, not a step in aid—*See* Limitation Act art. 182 (5) and (6) 130

——*Suit to set aside—Jurisdiction of inferior Court to entertain Suit—Test—Nature of reliefs which inferior Court can grant—Revival of suit in which decree was passed—Application for, to be made to which Court—Superior Court if has concurrent jurisdiction to entertain suit—Consent decree obtained by fraud—Remedy of aggrieved party—Suit or review—Decree-obtained by fraud if a nullity.*

It is competent to a Court of inferior jurisdiction to entertain a suit to declare a Compromise decree obtained in a Court of superior jurisdiction to be not binding on the plaintiff as having been obtained by fraud, provided the suit is, as regards the amount for which the Compromise decree was passed and as regards the situation of the properties affected by and the residence of the parties to the decree, within the cognizance of the inferior Court. The mere fact that the suit in which the Compromise decree was passed was for an amount exceeding the pecuniary jurisdiction of the inferior Court does not deprive it of its jurisdiction to entertain the suit provided the decree itself was for an amount within its jurisdiction.

In such a suit the inferior Court has no jurisdiction either to set aside the decree of the superior Court or to direct that the suit in which the decree was passed should be retried and decided on the evidence.

Semble The remedy of the plaintiff, if he succeeds in getting the declaration sought for, is to apply to the Superior court either to revive the suit or to proceed with it.

Per Srinivasaiyengar, J:—The Superior Court may also have jurisdiction to entertain the suit.

The more appropriate mode of setting aside a consent decree for fraud is by a separate suit inststuted for that purpose rather than by a motion in the cause in the nature of a review

A decree obtained by fraud is not a nullity and is not wholly void.

Arunachalam Chetty v. *Sabapathy Chetty*. (*Spencer and Srinivasa Aiyangar JJ.*) 499

Deed—Construction—Contemporanea exposit—Scope of the doctrine—*See* Landlord and Tenant 370

——Contruction Mortgage and lease, viewed as parts of the same trans action—circumstances against—See Transfer of property Act S. 61 581

Deed—*Construction*—" *Panayam* "—*Mortgage or charge*—*Mortgage-Decree—Interest, rate of.*

Deed—*Contd.* PAGE.

A document executed in Malabar and styled a "panyam" under which the borrower agrees to pay within one year principal sum secured by the document with interest, creates a simple mortgage and is not a mere deed of charge.

Ordinarily a mortgagee is entitled to interest at the rate specified in the mortgage instrument till the date fixed in the decree for re-payment of the mortgage amount.

Ryrappan Nambiar v. *Raman Nambiar*, (*Sadasiva Aiyar, and Spencer, JJ*) 679

Fraud—Decree obtained by—Suit to set aside—Jurisdiction of inferior Court to entertain suit—*See* Decree 499

——*Fraudulent transfer—Fraud not effected—Right of real owner to recover—Maxim* "allegans turpitudinem inam non est audiendus". *Scope and applicability—Mortgage—Suit for sale mortgage—Need of mortgage taken in name of plaintiff's natural mother benami for plaintiff for fraudulent purpose—Admission by plaintiff of fraudulent purpose—Right of plaintiff to recover—Fraud not effected—Effect.*

Where in a suit for sale on a mortgage, the deed of mortgage itself standing in the name of plaintiff's natural mother, it was either admitted by plaintiff himself or found by the Courts below that the principal amount of the mortgage came out of the estate of one Appanna and that, as there were disputes then going on as to whether plaintiff or one R was the validly adopted son of Appanna, S. Appanna's widow, caused the deed to be executed in the name of plaintiff's natural mother benami for plaintiff with the fraudulent intention of depriving R of his rights to the property in the event of his succeeding in establishing the validity of his adoption, but that, inasmuch as R subsequently renounced his claim to be the adopted son and to the amount of the mortgage deed, no fraud had in fact been effected, *held* that plaintiff, was entitled to succeed.

Per The Chief Justice :—It is well settled that, if a plaintiff cannot maintain his cause of action without showing that, as part of such cause of action, he has been guilty of illegality, the Courts will not assist him in his illegality.

But even though plaintiff as part of his cause of action has to prove that the deed was taken benami in the name of another for a fraudulent purpose yet if no fraud has in fact been effected, he is entitled to succeed.

Per Oldfield, J. :—Neither the averment nor proof that the deed was taken benami for a fraudulent purpose was necessary for the establishment of plaintiff's claim and his own admission regarding it was immaterial. The case was therefore not one to which the maxim *allegans trupitudinem inam non est audiendus* had any application.

Rajagopalachar v. *Sundaram Chetty.* (*The Chief Justice and Oldfield, J.*) 659

Easements Act, S. 17—*Surplus water flowing in defined channel—Right of easement in respect of—Acquisition—Presumption of grant of right to surplus water—Circumstances justifying—Englisn Law and Indian Law—Comparison of.*

A person can acquire a right of easement with respect to water which is discharged over the surplus weir of a tank if he has been using and

Easements Act—*Contd.* PAGE.
enjoying the water for a sufficient length of time and as a matter of right as laid down in the Indian Easements Act.

Rayappan v. *Virabadran* (1884) I. L. R. 7. M. 530 followed.

Where it appeared that the water of a tank fed by rain water as well as surface water from neighbouring lands flowed in a defined channel on to the respondents' land through the land of the appellant, who was not the owner of the tank, and that the respondent had been using and enjoying the said water for a sufficient length of time and as a matter of right as laid down in the Easements Act, *held* that he must be deemed to have acquired a right of easement with respect to the same notwithstanding the fact that the water was what might be called surplus water. *Held,* further that in the circumstances of the case a grant of the said right might be presumed.

Bodduluru Nagayya v. *Bachu Chenchuramayya.* (*Abdur Rahim and Bakewell, JJ.*) 6

Election—Quorum *at meetings of electoral body, rule as to—Exceptions to the rule—Notice of meeting—Member of electoral body when entitled to—Mahomedan Law—Scheme for management of a charity—Appointment of minor, as* muttawallis, *invalid.*

A scheme for the management of a Mahomedan Charity provided *inter alia,* for a Managing Committee consisting of five members and three *muttawallis,* directed that vacancies in the Committee should be filled by election by an electoral body consisting of the continuing or surviving members of the Committe. There was no provision of a *quorum* at an electoral meeting or for a minimum number of voters to be recorded for a candidate to render his election valid. Nor was there proof of any course of business adopted by the electoral body fixing the *quorum* at electoral meetings. On the occurrence of a vacancy in the committee, only three members of the electoral body which then consisted of six validly appointed members attended the electoral meetings and elected the plaintiff. *Held,* that the election of the plaintiff was invalid.

In the absence of a validly framed rule or course of business from which such a rule could be inferred fixing the *quorum* at 'electoral meetings' the law is that an election by a definte electoral body is valid only when a majority of that body are present at the meeting.

A member of an electoral body whose appointment as such is invalid, need not be given notice of meetings to be held by that body.

Where a scheme framed by a Court directed the appointment of competent men to be *muttawallis* of a Mahomedan religious endowment, *held* that the appointment of a minor to the office was invalid.

Syed Hasan Raza Sahib v. *Hasan Ali Sahib.* (*Ayling and Seshagiri Aiyar, JJ.*) 348

Estoppel—*Exchange of land—Unregistered instrument—Erection of costly buildings—Actings of the parties—Part performance—Acquiescence—Equitable Estoppel—Invalid transfer—Ejectment—Right to Compensation—Transfer of Property Act, Ss.* 51, 54 *and* 118.

The plaintiffs and the defendants, by an unregistered instrument agreed for mutual convenience to an exchange of certain plots of land forming part of their adjoining house sites. More than a year after the transaction, the defendants erected a costly building on the land which fell to them under the instrument and while the building was in progress

Estoppel—*Contd.* PAGE.

the plaintiffs not only kept quiet but received an additional sum from the defendants on the ground that the land that fell to the share of the latter was larger in extent. Subsequently the plaintiffs sued to eject the defendants on the ground that the instrument of exchange being unregistered did not pass title.

Held, per *Sadasiva Aiyar and Napier, JJ.*, (*Abdur Rahim, J.*, dissenting) that the plaintiffs were entitled to a decree for ejectment subject to the liability to pay compensation for improvements, to the defendants.

There was no room for the application of the doctrine of estoppel by acquiescence in the case, having regard to the fact that both at the time when the erection of the building was going on and at the time when they received the money as compensation for the deficiency in area, the plaintiffs were not aware of their subsisting right and its infringement by the action of the defendants, but had acted in the full belief that they (plaintiffs) had no longer any title to the land they had parted with.

The defendants having erected the buildings on the land without in the least believing that the plaintiffs were the owners of the site or that they (defendants) could build only with plaintiffs' consent, express or implied it was impossible to infer a license in favour of defendants by the plaintiffs to build with permanent right over the site and the buildings.

In England the doctrine of part performance belongs to the sphere of contract and operates, where applicable, to allow a party to prove a contract in an action, in spite of a statutory prohibition. In India, however, neither the doctrine of part performance nor the doctrine that "Equity regards that as done which ought to be done" can be invoked so as to effect a valid transfer of immoveable property without a registered instrument in cases where such instrument is required by S 54 of the Transfer of Property Act.

The word "transferee" in S. 51 of the Transfer of Property Act includes also a transferee under an invalid transaction of transfer and the words "the person causing the eviction" include also the transferor under an invalid transaction of transfer.

Per *Sadasiva Aiyar, J.*:—Where B believing that he is the absolute owner, erects buildings on land purported to be transferred to him by A, under an invalid instrument, B has only one of two rights, *viz.*, either to have the value of the improvements made by him estimated and paid by A, the evictor or to require A to sell his interest in the property to him at the then market value irrespective of the building. The option however, is with A, the person entitled to evict.

Per *Abdur Rahim, J.* :—Under the circumstances, the equities in favour of the defendants were a sufficient answer to the plaintiffs suit for ejectment. What are the circumstances which should be sufficient to raise an equity that would be an answer to a suit for possession by a person who purported to convey the property by an unregistered instrument must depend on the facts of a particular case ; but they must be such as should have altered though not irretrievably the position of the defendant acting on the faith of the bargain sought to be resiled from.

The plaintiffs by reason of the contract to exchange having been fully performed and having stood by and acquiesced in the defendant's building and received a further payment were estopped from eje ting the defendants.

Estoppel—*Contd.* PAGE.

The doctrines of part performance and estoppel by acquiescence were fully applicable to the circumstances of the case so as to effectually bar the plaintiffs from enforcing their claim.

The existence of estoppel does not depend on the motive or knowledge of the matter, on the part of the person making the representation. It is not essential that the intention of the person whose declaration, act or omission has induced another to act or to abstain from acting should have been fraudulent or that he shall not have been under a mistake or mis-apprehension.

[Decision of Seshagiri Iyer, J. in *Ramanathan Chetti* v. *Ramaswami Chetty* (1915) 30 M.L.J. 1. affirmed]

Ramanathan Chetty v *Ranganathan Chetty*. (*Abdur Rahim, Sadasiva Aiyar and Napier, JJ.*) 252

———Inconsistent pleadings in successive proceedings—Doctrine if applicable to pleas based on abstract question of procedure law—*See* Limitation Act, Art. 86 463

Evidence—Police diaries—Entries in, relevancy of—*See* Criminal Procedure Code S. 172 555

Evidence Act, S 35—Copies of letters in registers of official correspondence kept for reference and record admissible as reports and records of acts done by public officers—*See* Madras Court of Wards Act, S. 35 ... 277

———S. 35—*Madras Act III of 1899 (Registration of Births and Deaths Act)—Ss. 4, 5 and 17—Death register kept by village Karnam or Reddi—Admissibility thereof and of its public extract—Board's proceedings dated 5—2—1874—Effect.*

By virtue of the Board's proceedings dated 15 February 1874 a village Karnam or a Reddi keeping a register of deaths acts as a public servant in the discharge of his official duty within the meaning of S. 35 of the Evidence Act and a register which is so kept by him under the directions of the Board of Revenue since the year 1865 is admissible under the first part of S 35 of the Evidence Act, quite apart from Madras Act III of 1899 (Registration of Births and Deaths Act). Such a register is admissible also under the second part of S. 35 because the maintenance thereof by a village officer is obligatory under Madras Act III of 1899.

A public extract of such a register is evidence of the actual date of the death mentioned in it.

Ramalinga Reddi v. *Kotayya.* (*Coutts Trotter and Seshagiri Aiyar, JJ.*) 60

———Ss. 90 and 114—Ancient document—Unsigned cadjan accounts—No presumption of correctness—*See* Landlord and Tenant ... 84

———S. 91—Unregistered agreement to lease—Suit for specific performance or damages—Document inadmissible in evidence—Other evidence of the contract inadmissible—*See* Registration Act, Ss. 3, 17 and 49 596

———Ss. 92, 99—*Construction — Absolute Conveyances alleged to be transfers of Mortgages—Whether evidence in proof of such allegation may be given— Dealings with a third person's property—Evidence of notice of third person's title.*

Respondents sued for possession under deeds purporting to be absolute conveyances. Appellants tendered evidence to show that to the respondents' knowledge the properties belonged to a third person who had

mortgaged them to appellants and that the deeds were intended to operate only as transfers of the mortgages.

Held:—that such evidence was admissible.

S. 92 of the Indian Evidence Act, which excludes evidence contradicting the terms of written instruments in terms applies only "as between the parties to any such instrument or their representatives in interest." Whenever accordingly evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains.

Held, also, that if S. 92 applied proviso 1 to that section would admit the evidence, because it would be a fraud to insist upon a claim to property arising out of such a transaction, the claimant knowing that the true owner had never parted with it.

In cases to which S. 92 is applicable, the English Equity doctrine as expressed by Lord Justice Turner in *Lincoln* v. *Wright* (1859) 4 De. G. and J. 16. and followed in a long series of Indian cases was definitely excluded in India by the decision in *Balkishen Das* v *Legge* (1899) L. R. 27 I. A. 58. The law is that oral evidence is not admissible for the purpose of ascertaining the intention of parties to written documents, and though attempts have been made to engraft an exception on this rule in favour of evidence relating to the acts and conduct of the parties, it is now settled that such evidence is inadmissible.

Achutaramaraju v. *Subbaraju* (1901) I. L. R. 25 M. 7=11 M. L. J. 370. *Maung Bin* v. *Ma Hlaing* (1905) 3 L. B. R. 100 and *Dattu Valad Totaram* v. *Chandra Totaram and-another* (1905) I. L. R. 30 Bom. 119. approved.

Maung Kyin v. *Ma Shwe La*, (*Lord Shaw*,) P. C. 648

———S. 99—Absolute conveyance—Allegation that it was only a transfer of a mortgage—Evidence in proof of such allegation if can be given—Third party—*See* Evidence Act, Ss. 92 and 99 ... 648

———S. 108—*No presumption as to the death of a person at a particular time—Person relying on the fact, bound to establish it by evidence—No presumption that a person died leaving no heirs.*

In 1912, plaintiff alleging himself to be a reversioner, sued for possession of the estate of the last male owner, whose widow had died in 1909. The defendants among other pleas, stated that one G. a nearer reversioner was alive when the widow died and that the plaintiff was excluded by him. In answer to this averment plaintiff stated that G. was not heard of for 30 years and that the presumption therefore was, that he was dead in 1909.

Held, that, though G. was not heard of for 30 years before suit, there was no presumption that he was dead in 1909 when the inheritance opened and the plaintiff having failed to prove that G. was dead in 1909, his suit must be dismissed.

It is for the party who founds a right upon the fact of a person having died at a particular time to establish that fact affirmatively by evidence; the evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail.

Srinath Das v. *Proboth Chander Das* (1910) 11 C. L. J. 580. *Narki* v. *Lal Sahu* (1909) I. L. R. 37 C. 103. *Muhammad Shariff* v. *Bande Ali* (1911) I. L. R. 34 A. 36. *Veeramma* v. *Chenna Reddi* : (1912) I. L. R. 37 M. 440. *In re Phene's Trusts*, (1869) L. R. 5 Ch. A. 139. referred.

Evidence Act—*Contd.* PAGE

Held further, that the Lower Appellate Court acted rightly in disallowing the plaintiff's application to amend the plaint by claiming title as the heir of G. for there was no guarantee that plaintiff was the heir of G. and there was no presumption arising from the presumption of the death of an individual that he left no heirs of his own behind him. *Jackson v. Ward*, (1907) L. R. 2 Ch. 354, referred to.

Ponnaloori Ellamandayya v. *Chelakapathi Lakshmayya*. (*Seshagiri Aiyar and Bakewell, JJ.*) 295

———S. 110—Presumption—Hindu widow in possession—Presumption that she is absolute owner. *See* Purdanashin Lady 665

Execution—Maintenance decree—Decree charging specified items of family property—Realisation of arrears by sale of the properties in execution. *See* Hindu Law, Widow 601

———Stay of—order by appellate court becomes effective only when communicated to the lower court. *See* Stay of Execution ... 515

Executor—Debtor, appointment of, as one of the executors— Debt payable becomes part of the assets of the deceased in the hands of executor if he acted as such—Executor not acting as such or renouncing office—Suit for recovery of debt—Limitation—Executor in the position of stranger debtor. *See* Will,—Administration ... 195

———Promissory note by — Debt under note borrowed *bona fide* in course of due administration—Right of creditor to be subrogated to rights of executor—Suit on promissory note—Subrogation if and when can be allowed in. *See* Promissory Note 631

Foreign Decree—Execution—Small Cause. Court—Madras, Powers of Judge and Registrar, respectively—*See* Small Cause Court ... 539

Government of India Act, 1915 S. 101 (2)—*Proviso to—Object and effect of—Governor-General in Council—Power to appoint additional Judges—Appointments from time to time for periods not exceeding two years—Validity.*

The object of the proviso to S. 101 (2) of the Government of India Act, 1915, clearly was to provide for occasions when the permanent strength of the High Court is unable to cope with the work for disposal, but the work is not sufficient to justify the appointment of another permanent Judge, by enabling additional Judges to be appointed from time to time for such fixed periods not exceeding two years as may be found necessary. The proviso must therefore be read as meaning that appointments may be made from time to time for such period, not exceeding two years, as may be required from time to time on each occasion when the power is exercised.

Kandasami Pillai v. *Muthuvenkatachala Maniagar*. (*The Chief Justice and Kumaraswami Sastri, J.*) 787

Grant—Presumption of—Right to surplus water flowing in defined channel. *See* Easements Act, S. 17 674

Guardians and Wards Act, Ss. 7 (a) and 29—*Head of a mutt—Minor—Trust property—Appointment of guardian—Sale of property under sanction of Court for discharging debts of predecessor-in-office—Proceedings without jurisdiction—Matadhipathi, position and powers of.*

During the minority of the plaintiff, the head of a *mutt*, the District Court purporting to act under S. 7 of the Guardians and Wards Act appointed a guardian of his person and property. To discharge the debts contracted by the predecessors-in-office of the plaintiff some of the proper-

Guardians and Wards Act—*Contd.* PAGE.
ties were sold by the guardian with the sanction of the court under S. 29 of the Act. *Held*, that the properties in question being trust properties, the orders of the District Court appointing a guardian and sanctioning the sale of the properties were wholly without jurisdiction and that the sale was liable to be set aside.

A *Dharmakarta* of an endowment has ordinarily no beneficial interest in the surplus income of the endowment, though in a given case such a right may be established either by the custom of the institution or otherwise. A right to a portion of the income of the trust estate does not vest the property in the beneficiary so as to attract the operation of Ss. 7 and 29 of the Guardians and Wards Act.

Quære:—Whether the decision of the Judicial Committee in *Ram Parkash Das* v. *Anand Das* (1916) I. L. R. 43 C. 707; 31 M. L. J. 1. is not confined to the class of mutts under the consideration of the Board in that case, and whether the decision in *Balusami Iyer* v. *Venkatasami Naicker* (1916) 32 M. L. J. 35, does not lay down the rule too broadly?

Obla Venkatachalapathi Aiyar v. *Thirugnana Sambanda Pandara.* (*Seshagiri Aiyar and Bakewell, JJ.*) 297

————S. 29—Head of a mutt—Minor—Trust property—Appointment of guardian—Sale of property under sanction of Court for discharging debts of predecessor in office—Proceedings without jurisdiction—*See* Guardians and Wards Act, Ss. 7 (a) and 29 297

Hindu Law—Adoption—Right of adopted son to question alienation by widow during her life-time—*See* Hindu Law, Widow 387

———— Dancing girls—Succession—Preference of females to males, extent of, *See* Hindu Law, Succession 207

————Debts—Antecedent debts, meaning of—Liability of sons during the father's life time—*See* Hindu Law, Joint Family 14

———— Debts—Father — Son not liable on promissory note executed by father after partition in renewal of a note executed before —Pious obligation of son, extent of. *See* Hindu Law, Father ... 519

————*Father—Liability of son on promissory note executed by father after partition in renewal of a note executed before—Debts of father—Pious obligation of son, extent of.*

A Hindu son cannot be made liable during his father's life-time on a promissory note executed by his father after partition, in renewal of a note executed by him before partition.

The decision of the Judicial Committee in *Sahu Ram Chandra* v. *Bhup Singh* (1917) L. R. 44 I. A. 126 does not overrule the course of decisions in this country affirming the right of a creditor of a Hindu father whose debt has not been incurred for an illegal or immoral purpose, to join the father and his sons in a suit on the debt and to bring to sale in execution of the decrees in such suit the interest both of the father and his sons in the joint family property.

Per Kumarasami Sastri, J. The decision in *Sahu Ram Chandra* v. *Bhup Singh*, (1917) L. R. 44 I. A. 126, makes it clear that it is the primary duty of the father to pay debts incurred by him not for any family necessity but for his own purposes and that the pious duty of the son only arises when the assets of the father are insufficient assuming that it arises at all during the life-time of the father. In other words,

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the pious duty is limited to the debts which the father is unable to satisfy out of his share or his self-acquired properties.

Peda Venkanna v. *Sreenivasa Deekshatulu.* (*The Chief Justice and Kumaraswami Sastri, J.*) 519

——Guardian—Minor—Power of manager to deal with minor's estate, extent of. *See* Religious Endowment 1

——Illegitimate son—Maintenance, right to, out of joint family properties of putative father. *See* Hindu Law, Maintenance ... 455

——Illegitimate son—Right of putative father to succeed to illegitimate son's property. *See* Hindu Law, Succession 224

——*Illegitimate son—Right to share in family property—Nature and extent of right—Property allotted to legitimate sons at a partition with the father, if liable to the claim of the illegitimate son.*

An illegitimate son of a Sudra by a permanently kept concubine can, under the text in the Mitakshara, take a share equal to that of a legitimate son, at his father's choice, and after his father's death can demand of the legitimate sons a share equal to half of that of a legitimate son. This provision for the illegitimate son is really a sort of capitalised maintenance. Therefore, where a father and his sons are in possession of family property and there are no other co-parceners of the same degree with the father, then, as to that joint family property, the right to a full share or possibly less can be given by the father to his illegitimate son. Where, however, the father and his sons have separated, there is no longer the material on which the claim of the illegitimate son can operate and the son's share of the property after partition, cannot be made liable to this claim.

Ram Saran Gerain v. *Tekchand Gerain* (1900) I. L. R 28 C. 194. relied on ; *Krishnayyan* v. *Muthusami* (1883) I. L. R 7 M. 407. *Jogendro* v. *Nityanand* (1890) I. L R. 18 C. 151. *Karuppa Gounden* v. *Kumarasami Gounden* (1901) I L. R. 25 M. 429. and *Visvanathasami* v. *Kamu Ammal* (1912) 24 M. L. J. 271, referred to.

Nathamuni Mudali v. *Parthasaradhi Mudali.* (*Ayling and Napier, JJ.*) 203

——*Joint family—Acquisition—Blending of self-acquired property with ancestral property—Effect of entries in account book as showing whether funds are joint or separate.*

A, a member of a Hindu joint family, whose home was at Lucknow, practised as a pleader at Hardoi, and made considerable savings from his professional earnings. He eventually became managing member, but was all along entrusted with the management of the joint family property in Hardoi district. Throughout he kept the accounts of the joint property and of his own earnings in one account book. He purchased sundry properties out of the funds so entered in the name of his son-in-law B, and stated that he made such purchases to provide for B.

Held, that by blending his private earnings with the receipts and payments on joint account he showed an intention to make them joint property : but that this was not conclusive that all purchases entered in the book were made for the joint family : and that as regards the purchases in the name of B, A's statement that they were made to provide for B was a statement against his own interest and as such admissible in evidence, and that coupled with the other evidence in the case it established B's title to such properties as against the joint family.

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Pandit Suraj Narain v. *Pandit Ratan Lal.* (*Lord Buckmaster, L. C.*) (P. C.) 180

——*Joint family — Father's powers of disposition—Mortgage or sale for an antecedent debt only valid if there be real dissociaton in fact —Pious obligation of sons and grandsons to discharge father's debts only arises on father's death—Legal necessity—Burden of proof.*

Under the law of the Mitakshara the joint family property cannot be the subject of a gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners.

The father, in his capacity of manager and head of the family, is at liberty to affect or dispose of the joint family property for estate or family necessity, but otherwise he has no power of sale or mortgage except for an antecedent debt.

A borrowing made on the occasion of the grant of a mortgage is not such an antecedent debt. The exception applies only to the case when the debt has been incurred irrespective of the credit obtained from the joint family property. In order to validate a mortgage for an antecedent debt not only antecedency in time but real dissociation in fact is required.

The obligation of religion and piety which is placed upon sons and grandsons under the Mitakshara Law to discharge their progenitors'-debts, does not attach while the said progenitors are a live.

The doctrine of *onus probandi* in cases where legal necessity is alleged, is largely based upon the necessity of protecting the rights of third persons. There is no hard and fast rule, and the presumption proper to be made must depend on the circumstances of each case. In the present case where the mortgagees sued after 27 years, nothing having been done on the mortgage in the interval:

Held, that the onus of proving legal necessity had been properly laid on plaintiffs.

Sahu Ram Chandra v. *Bhup Singh* (*Lord Shaw*) P. C. 14

——*Joint family—Manager—Mortgage by head of joint family—Whether property can be made available to the extent of mortgagor's interest—Equity arising out of representation of authority.*

Where the property of a Hindu joint family is mortgaged by one of the members (save and except by the head of the family for antecedent debt or proved necessity of the joint family) the general law is that the mortgage is not valid at all, even to the extent of the mortgagor's interest.

It is possible that exceptions to this general rule may arise from special circumstances, *e. g.*, from a representation or undertaking by the mortgagor that he had power to mortgage the joint property, but no special circumstances were held to exist here.

Mahabir Prasad v. *Ramyad Singh* (1873) 12 Beng. L R 90 discussed.

Lachman Prasad v. *Sarnam Singh* (*Viscount Haldane*) P. C. ... 39

——*Joint family—Partition—Agreement by a member of the joint family with the manager under which the latter is to pay certain sums for maintenance—Whether effects a severance of the joint family—Suit for partition by one member of the family alone against the manager—Other co-parceners not parties—Decree passed awarding his plaintiff's share—Whether effects a severance of the other co-parcener s,*

shares—Provision in a partition for a stranger, not being a bona fide family settlement, invalid.

Where a suit for partition of certain properties bequeathed under a will by a father is instituted and after finding that the properties were joint family properties and consequently the will was invalid, the lower court decreed partition of the family properties and on appeal to the Sudder Adaulat, an agreement was entered into between a junior member of the joint family (in the present case, a partible zamindari) and the manager by which, the latter was to give the former Rs. 400 every month out of the zemindari income for maintenance and also certain lands to be cultivated by him and it stated that the provision was in consideration of the fact that a partition of the zamindari, which would if left intact be a source of protection to the family, will endanger the status of the zemindari and that it was with a view to prevent a division of the zemindari and to keep it as an impartible estate, such agreement does not in its true-construction effect a severance of the joint family but only provides for a convenient mode of enjoying the joint family properties. *Sri Rajah Viravara Thodarammal-Rajya Lakhsnmi Devi-Garu* v. *Sri Raja Viravara Thodhramal Surya Narayana Dhatrazu Bahadur Garu.* (1897) I.L.R. 20 M. 256 P.C. followed.

Where a junior member of the joint partible zemindari sues the manager for partition of his share not making the other co-parceners parties the decree in the suit which merely allots his share of the properties does not effect a division. as between the other members and the manager so as to effect a partition between them also.

The ruling of the Privy Council in *Girija Bai* v. *Sadashiv Dhundiraj*, (1916) L R. 43 I. A. 151. to the effect that the filing of a plaint in a suit for partition is sufficient to effect a partition, does not mean that the effect of filing such a plaint is necessarily final. Treating the matter as one of individual volition, it is open to a co-parcener who has filed a suit for partition to abandon that intention before the suit proceeds to a decree and to continue in a state of jointness.

Where a partition takes place under a decree of Court whereby one member claims his share and obtains it, the effect of the decree on the remaining co-parceners must be determined by the terms of the decree or where it is ambiguous by the scope of the suit. If the suit is one for general partition (in which case it is necessary to determine the shares of all the members and to grant reliefs to all of them) and the decree declares the shares of all the members in the items of family property there will be a severance of status so far as the members are concerned and if the others in spite of the decree continue to remain joint it can only be under an agreement express or implied to re-unite. But where from the scope of the plaint or pleadings all that appears is that one member of an undivided family wanted to cut himself off from the rest after receiving his share and the other members neither asked nor evinced any desire for a partition *inter se*, the consideration of the shares of the others is only incidental for the purpose of giving the relief which the plaintiff wants and the joint status of the others is unaffected by the decree in favour of one member. *Sudarsanam Maistri* v. *Narasimhulu Maistri*, (1901) I. L. R. 25 M. 149. *Rukma Bai* v. *Balabux*, (1903) I. L. R. 20 C. 725 (P.C.) *Ranganatha Rao* v. *Naraynaswami Naicker*, (1908) I. L. R. 31

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to M. 482. *Durga Dei* v. *Balmukund*, (1906) I. L. R. 29 A. 98. *Rangaswami Naidu* v. *Sundararaja Naidu* (1916) 31 M. L. J. 472. referred.

Per Kumaraswami Sastri, J.:—An agreement whereby a considerable portion of joint family property has been excluded from partition and given to persons who have no legal claim whatever cannot be binding upon the minor sons simply because their father is a party to it unless it can be supported as a *bona fide* compromise of a disputed claim. *Ramkishore Kedarnath* v. *Jai Narain Ramrachpal*, (1913) I. L. R. 40 C. 966 followed.

Palaniammal v. *Muthuvenkatachala Maniagarar* (*The Chief Justice and Kumarasawmi Sastri, J.*) 759

———*Maintenance — Permanent concubine — Right to maintenance from the family property of deceased paramour—Illegitimate son.*

An illegitimate son of a deceased Hindu, born of his permanently kept concubine, has a right of maintenance against the family property of which his putative father was a co-parcener. Similarly, a permanently kept concubine of a deceased Hindu has a right to be maintained from the family property of which her paramour was a co-parcener.

Authorities on the subject reviewed. *Panchapagesa Odayar* v. *Kanaka Ammal.* (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) ... 55

———*Partition—Severance in status—Unilateral declaration by major —Co-parcener—Communication to natural guardian, if essential.*

Though it is open to a member of a Joint Hindu family to become divided in status from the other members by an unambiguous declaration of his intention to become divided, still to have that effect, the intention should be communicated to the other co-parceners. If the other co-parcener is a minor, an intimation of such intention to the person who would become the minor's natural guardian as soon as the partition is effected, is necessary.

Kamepalli Ayilamma v. *Mannem Venkataswamy.* (*The Chief Justice and Kumaraswami Sastri, J.*) 746

———*Partition—suit for partition dismissed though right to partition admitted—Whether status remains joint or several.*

A member of a Hindu Joint family instituted a suit for partition: The suit was dismissed on the ground that though he had a legal right to partition, he had in the Judge's opinion no proper motive for exercising that right. Thereafter he mortgaged his share and on the mortgagee suing, claimed to be still joint.

Held, that notwithstanding the judgment, the mortgagor had become separate from the date of his suit and that the mortgage of his share was valid. *Kawal Nain* v. *Budh Singh.* (*Viscount Haldane.*) (P.C.) ... 42

———Reversioner—Suit by nearest reversioner to challenge alienation by widow—suit withdrawn without liberty to sue afresh—Right of succeeding reversioner to challenge the alienation by suit, not barred. *See* Civil Procedure Code O. 23 R. 1 471

———*Sanyasam—Essentials of—Rites and ceremonies necessary for —Relinquishment or abandonment of property—Necessity*—Praisha Mantram—*Necessity—Distinction between ascetic of heretic sect and Orthodox Sanyasin.*

The essential feature of an Orthodox Sanyasam is the actual relinquishment of all property and an actual abandonment of all wordly

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concerns, down to even a desire for them. There need not necessarily be an actual transfer to, or a relinquishment in favour of, any particular person, but one about to become a Sanyasi may simply abandon his property in which case the law will vest it in his heirs.

The *Praisha mantram* is absolutely essential for an Orthodox Sanyasam.

Rites and ceremonies necessary to be performed for becoming an Orthodox Sanyasin.

Distinction between an ascetic of one of the heretical sects and an Orthodox Sanyasin.

Kondal Row v. *Iswara Sanayasi*. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) 63

———*Succession—Dancing Girls— Usage—Preference of females to males.*

Members of the dancing girl caste are Hindus. Male members of this caste are usually governed by the Hindu law and usage. Also when female members marry and have children, as they sometimes do, their family relations are governed by the Hindu law and presumably the ordinary Hindu Law of inheritance will govern succession to their properties. At the same time, their female children may remain unmarried and become professional *dasis* without any degradation or stigma attaching to them so long as they observe the caste customs. There is no dissolution of the natural tie of relationship between the members of the caste who remain unmarried and follow their trade and their married relations who lead a respectable life.

Usage has however sprung in their caste which permits affiliation of daughters and gives preference to females in matters of succession. The ordinary Hindu Law of inheritance which excludes females or prefers males to females, and which allows only a limited interest to female heirs, has no application to the dancing girl caste. *Held*, accordingly, in a case of disputed succession to the property of a dancing girl, that the mother's mother's father's brother's daughter was a preferable heir to the mother's mother's father's brother's daughter's son.

Authorities on the point discussed.

Subbaratna Mudali v. *Balakrishnaswami Naidu*. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) 20

———*Succession — Illegitimate son of permanently kept concubine entitled to status of dasi-putra—Succession to property of—Right of putative father surviving such son, there being neither issue, widow nor mother of son—Hindu Law—Inheritance—Text declaring male is heir of male—Mutuality—Interpretation of texts—Rules of.*

The putative father of an illegitimate son, born of a permanently kept concubine and entitled under the Hindu law to be the sole heir or one of the heirs to his putative father's properties, inherits, in the event of his surviving his illegitimate son, the properties of the latter there being neither widow nor issue nor mother of the said son.

Per Kumaraswami Sastri, J. :—As between the illegitimate son and his putative father filial relationship exists for all purposes of inheritance and succession.

Where a text expressly declares that a male is the heir of male, there is, in the absence of anything to the contrary in other texts, nothing to

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prevent the converse rule from being applied as a rule of equity and good conscience even though the case is not specially provided in the texts so long as there is nothing against it in the Smritis.

Subramania Iyer v. *Rathnavelu Chetty.* (*Chief Justice, Oldfield and Kumaraswami Sastri, JJ.*) (F. B.) 204

————Widow—Acquisition out of savings from income of properties granted for maintenance—Nature of estate. *See* Purdanashin Lady. 665

————*Widow—Adoption under authority from husband—Right of adopted son to set aside alienations by widow prior to adoption, during her life-time.*

A son adopted by a Hindu widow under her husband's authority, can during her life-time recover property alienated by her for no necessary purpose before the adoption was made

Sreeramulu v. *Krishnamma* (1902) I. L. R. 26 M. 143=12 M. L. J. 197 overruled.

Vaidyanatha Sastri v. *Savithri Ammal.* (*The Chief Justice, Oldfield and Kumaraswami Sastri, JJ.*). (F. B.) 387

————*Widow—Gift of entire property to daughter and daughter's son not binding on the reversion.*

It is not competent to a Hindu widow to divide the entire property of her husband among her daughters and daughter's children, so as to bind the reversioner. The fact that portions of the estate are given away at different times cannot validate such a disposition.

Ramaswami Aiyar v. *Vengidusami Iyer* (1898) I. L R. 22 M. 113=8 M. L. J. 170. *Kudutamma* v. *Narasimha Charyalu,* (1907) 17 M. L. J. 428 *Anivillah Sundararamaya* v. *Chereta Seethamma* (1911) 21 M L J. 695 distinguished

Sankkayala Virasami Naidu v. *Bommadevara Pichayya Naidu.* (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) 536

————*Widow—Maintenance charge—Decree charging specified items of family property—Realisation of arrears of maintenance in execution.*

Though a Hindu widow has a right to ask the court to charge any maintenance it might decree for her, on the property of the joint family, she has no charge on the whole or any specified item of that property till the decree declares it.

Where however a decree directs the maintenance of a Hindu widow to be paid out of the joint family property and confines the charge to certain items of such property, the widow is entitled to realise the arrears of maintenance due to her by attachment and sale of the properties so charged, in execution of the decree.

Sowbagia Ammal v. *Manicka Mudaliar.* (*Abdur Rahim and Kumaraswami Sastri, JJ.*) 601

Inam—Grant of—Presumption of grant of Melwaram only—Presettlement inam—Onus of proving grant of Kudivaram also on person setting up such a case—*See* Madras Estates Land Act S. 3 (2), (d) ... 548

————Title-deed—Construction—'Besides poramboke,' meaning of—Right to river beds if passes—*See* Madras Irrigation Cess Act Ss. 1 and 2 415

Injunction—Mandatory form—Temporary injunction—Jurisdiction of Courts to issue—*See* C. P. Code, O. 39, R. 2 448

Interest—*Contd.* PAGE.

Interest—Penalty—Provision for uniform rate of interest throughout—No provision for higher rate in case of breach—No penalty—*See* Contract Act, Ss. 16 and 74 302

Interpretation—Statute—Hardship—Considerations of, irrelevant, when terms of the section are clear—*See* Limitation Act, art. 134 ... 320

———Statute—Principles of—Reasonableness of Construction only arises when language ambiguous—Reference to preamble and proceedings in Legislative Council—Legitimacy of—*See* Malabar Compensation for Tenant's Imp. Act, S. 5 591

Jurisdiction—*Civil and Revenue Court—Suit by tenant contesting Landlord's right of sale for arrears of rent—Objections to validity of contract not covered by S. 26 of the Madras Estates Land Act.*

A Revenue Court exercising jurisdiction under the Madras Estates Land Act is entitled to hear and adjudicate on objections (other than those specified in S. 25 of the Act) to the validity of a Contract under which a ryot claims to hold the holding at a rent less than the ordinary or lawful rent payable on the land.

If the Court has jurisdiction to determine a matter, it must have jurisdiction to decide all questions necessary for that determination.

Sethurama Aiyangar v. *Subbiah Pillai.* (*Ayling and Srinivasa Aiyangar, JJ*). 599

———Decree obtained by fraud—Suit to set aside, maintainable in inferior Court—*See* Decree 499

Land Acquisition Act, Ss. 12 (2), 45 (3) and 53—*Notice of award by Collector under S. 12 (2)—Whether service on the manager of the office of a receiver of an estate, proper service within the meaning of —Applicability of the provision of the Civil Procedure Code to such notice.*

Notice of an award passed by the Collector under the Land Acquisition Act is not properly served on the manager of the office of the Receiver of an estate in the absence of the Receiver under S. 12 (2) of the Act read with S. 45 Sub-sections 2 and 3.

Quære:—Whether the provisions of the Civil Procedure Code apply to such notice by virtue of S. 53 of the Land Acquisition Act.

Papamma Rao Garu v. *Revenue Divisional Officer, Guntur.* (*The Chief Justice and Kumaraswami Sastri, J.*) 472

Landlord and Tenant—*Inam granted in favour of a temple—Cultivating tenants—Occupancy right—Evidence necessary to establish—Presumption of permanent tenancy from conduct of landlord*—Debutter *property—Terms of tenancy defined by "muchilika," effect of—Meaning of the terms, "rokkakuthagai," "tharam faisal," "kudivaram," "miras," "kudimiras," "ullur Purakudis,"—"pannai" "olavadai miras," "olavadi kudimiras" and "kasavargam"—Evidence Act, Ss. 90 and 114—Ancient document—Unsigned cadjan accounts—Presumption as to—Transfer of Property Act. S. 51—Transferee from tenant* bona fide *claiming occupancy rights—No right to compensation for improvements.*

The village of M. in the Tanjore District had been granted as an inam by the Rajah of Tanjore to a temple of which the plaintiffs were the trustees. More than 200 years ago the lands in the village (most of them uncultivated) were held by the temple on what was known as the "rokka

kuthagai" tenure The management of the temple and its properties passed into the hands of the Collector of the District as representative of the East India Co., in 1806. In the Collector's register prepared in 1809, the extent of cultivable *nanjah* and *punjah* land in the village was given roughly as 80½ *velis* and the temple was entered as the owner of these as well as the remaining waste lands. From the *paimash* accounts it appeared that about the year 1820, the extent of cultivated area in the village was 93 *velis* and that at least in 21 *velis* of wet land the temple owned both the *kudivaram* and the *melvaram* interest and was cultivating the same with its own *pannai-purakudis* (farm-servants.). As regards lands not directly under *pannai* cultivation, the profits due to the temple were collected from the tenants in the shape of a share of the produce From 1820 to 1830 the Collector of the District as Manager of the temple let the temple lands for cultivation to the highest bidders, on short terms of 3 to 5 years. In 1831, the then Collector, introduced the "Tharam Faisal Muchilika system" under which the temple lands were leased out for an indefinite term to the predecessors-in-title of the defendants at an annual paddy rent fixed on the then cultivable area with provisions for the commutation of such paddy rent into its money value and for the payment of additional rents for cultivation of excess area or of waste lands. The *muchilika* had been executed to the Collector by nine of the principal Karaigar cultivators of M. village, acting as the representatives of the Ullur Karayedu cultivators. In 1847 the plaintiffs predecessors-in-office took over the management of the temple and its properties and executed *a muchilika* to the Collector whereby they agreed among other things, not to violate or encroach upon the customary rights of "the purakkudies of the said sarvamanyam village.'

From the year 1867 the defendants or their predecessors-in-title had been mortgaging and selling the lands in their holdings to the knowledge of the temple trustees and in the rent receipts granted to them as well as in some pymash accounts the former had been described as "kudimirasdars." In the year 1918, the trustees of the temple sued to eject the defendants after serving them with proper notices to quit.

Held that, in the circumstances of the case, and having regard to the *muchilika* executed by their predecessors-in-title in the year 1831, the defendants had no occupancy rights in the lands in their possession but were merely holding them under a yearly tenancy and that they were liable to be ejected.

Chockalinga Pillai v. *Vythilinga Pandara Sanadhi* (1871) 6 M. H. C. R. 164 *Thyagaraja* v. *Gyana Sammandha Pandara Sannadhi* (1887) I. L. R 11 M. 77 *Chidambara Pillai* v. *Thiruvengadathiengar* (1887) 7 M. L. J. 1 *Mayandi Chettiar* v. *Chockalinga Pillai* (1904) I. L. R. 27 M. 291 relied on.

Held further, that the presumption of a permanent tenancy ordinarily arising from the acquiescence and conduct of the landlord, had no application to the present case, first because, the lands in question being *debutter* it was beyond the legal competence of the trustees to grant a permanent lease thereof except for the necessities or clear benefit of the temple, and secondly because there was an instrument defining the terms of the tenancy as between the parties.

Satya Sri v. *Kantik* (1912) 15 C. L. J. 227, *Sevatha Muthu Asari* v. *Rev. Mesquita* (1913) 24 M. L. J. 642 referred to.

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Meaning of the terms, "rokka kuthuagai," "tharam faisal," 'kudivaram" "miras," "kudimiras" "ullur purakudis" "pannai," "olavadai miras," "olavadai kudimiras" and "kasavargam," explained.

Neither S. 90 nor S. 114 of the Evidence Act enables the Court to presume that unsigned accounts more than a century old, which do not purport to be in the handwriting of any particular person or persons, were written by persons having authority in that behalf

Sheo Nandan Ahir v. *Ram Lochan Singh* (1915) 13 A. L. J. 921 *Krishna Pal* v. *Jagat Kishore Acharya Chowdhury* (1915) 20 C. W. N. 643 *Uggrakant Chowdhury* v *Huro Chunder Sheokdar* (1880) I. L. R. 6 C. 209 referred to.

A transferee of lands from a tenant who *bona fide* believed himself to be entitled to occupancy rights therein is not entitled to compensation for improvements on ejectment by the landlord.

Narasayya v. *Raja of Venkatagiri* (1910) I. L. R 37 M. 1 referred to. *Naina Pillai Markayar* v. *Ramanathan Chettiar.* (*Sadasiva Aiyar and Napier, JJ.*) 84

——*Lease for* 99 *years—Covenant not to do any act to the detriment of the tenants—Effect of—Subsequent assertion of* Mirasi *right by lessee*—Contemporanea exposito, *doctrine of, when applicable—Trusts Act, S.* 90—*Renewal of lease—Right of tenants to the benefit of the renewal—Tenancy by estoppel.*

In the year 1801, the East India Compay who were the absolute owners of the suit lands most of which were waste granted them on lease for a term of 99 years. In the year 1840 the then owner of the leasehold interest purported to sell the lands to his brother describing himself as *Mirasidar*. In or about the year 1860 this alleged *Mirasi* right which included the occupancy rights in the lands became the subject of dispute between the then owner of the leasehold interest and their tenants (now represented by the defendants) and was finally decided to belong to the former. In 1889 however, the tenants were apparently recognised by the then owner of the leasehold interest as having occupancy rights in their holdings and *pattas* were issued to them acknowledging their *Kaipathu* rights. The term of the lease of 1801 expired in January 1900 and thereupon the plaintiffs who were the representatives of the original lessee as well as the tenants applied to the Government in rivalry with each other, for the issue of ryotwari *pattas* to themselves. In December 1904 the plaintiffs were granted a renewal of the lease on the same conditions as before Both in the original lease and in the renewed one, there was a covenant that the lessees " shall not do or cause anything to be done upon the leased premises, which shall grow to the annoyance, grievance, or damage of the said Company, their tenants or the inhabitants or their bounds." In 1913 the plaintiffs sued to eject the tenants after the issue of due notices to quit the lands.

Held, that the plaintiffs were entitled to a decree for ejectment and that the claim of the defendants to occupancy rights in the suit lands was not made out.

The Government who were the absolute owners of the suit lands in 1801 were not bound in any way by the assertion, behind their back, of *Mirasi* rights on the part of their lessee more than 40 years after the grant of the lease. The doctrine of *contemporanea exposito* must be

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restricted in its application to the acts and conduct of the *grantor* beginning contemporaneously with the grant and continued thereafter for a long course of years and had no application to the circumstances of the present case.

Raghoji Rao Saheb v. *Lakshman Rao Saheb* (1912) I. L. R. 36 B. 639=23 M. L. J. 383 referred to.

The covenant in the original as well as in the renewed lease was the usual covenant in English indentures creating leases by which the lessor protects himself against the acts of his lessees which might injure other tenants of his, either of the same land or of neighbouring lands, and could not be construed as a recognition by Government of the occupancy rights of the defendants in the suit lands.

As neither the plaintiffs nor the defendants had any interest in the suit lands on the grant of the renewed lease and as the former never represented themselves as acting on behalf of the latter either before or at the time of the renewal of the old lease S. 90 of the Trusts Act did not operate to confer on the defendants the advantage of the renewed lease obtained by the plaintiffs.

A tenancy by estoppel cannot be created where the act of the landlord which is relied upon (and which created a lesser right than the landlord represented himself to be entitled to create), did confer upon the tenant a right as lessee for some term, however short.

Weller v. *Spiers* (1872) 26 L. T. 866 referred to.

Swaminatha Mudali v. *Saravana Mudali.* (*Sadasiva Aiyar and Spencer, JJ.*) 870

———*Zemindar—Mokuraridar—Permanent Tenure—Minerals—Rights to Minerals—Mokurari pattah—Effect of pattah with all rights* (*mai huk hakuk*).

When a grant or lease is made by a Zemindar of a tenure at a fixed rent, although the tenure may be permanent, heritable, and transferable, minerals will not be held to be included in the absence of express evidence to that effect.

General expressions in such a Pottah (*e. g*, "with all rights", "with all right, title, and interest") do not increase the actual corpus of the subject affected by the Pottah. They only give expressly what might otherwise quite well be implied *viz*, that the corpus being once ascertained, there will be carried with it all rights appurtenant thereto.

The essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. To permit of the idea of partial consumption of the subject leased, minerals must be expressly denominated.

Where the proprietor of a zemindari executed a permanent heritable and transferable mokurari pottah at a fixed rent of a small portion of a village within its ambit "with all rights (mai huk hakuk)—appertaining to my zemindari", *Held*, that the mineral rights were not included in the pottah, which gave the mokuraridar only surface rights; and that in the absence of an express grant the mineral rights remained in the zemindar.

Megh Lal Pandey v. *Rajkumar Thakur.* (1906) I. L. R. 34 Cal, 356, reversed.

Landlord and Tenant—*Contd.* PAGE.

Kumar Hari Narayan Singh Deo Bahadur v. *Sriram Chakravarti* (1910) L. R. 37 I. A. 136. *Durga Prasad Singh* v. *Braja Nath Bose* (1911) L. R. 39 I. A. 133 ; and *Sashi Bhushan Misra* v. *Jyoti Prasad Singh Deo* (1916) L. R. 44 I. A. 46 followed.

Girdhari Singh v. *Megh Lal Pandey.* (*Lord Shaw,*) P. C. ... 687

Lessor and Lessee—Assignment of lease—Notice to lessee by assignee—Suit for arrears of rent after assignment—Decree in favour of lessor in the absence of assignee as party—Right of assignee to recover rent for the period—*See* Malabar Law 512

Libel—*Caste dispute—Publication of resolution of caste Panchayat—Privilege—Whether destroyed by irregularity in passing resolution—Jurisdiction of Caste Panchayat—Whether subject to control of Civil Courts*

B, the Chowdhri or Chairman of a Caste Panchayat, circulated to other members of the caste a resolution of the panchayat suspending social relations with G's family. In an action for libel brought by G. against B. it was contended that G. had no proper notice of the meeting of the panchayat that in consequence the passing of the resolution was contrary to natural justice, and B. was not privileged in publishing it.

Held, that B's prilege was not affeotd or rebutted by any defect in the notice to G. *Held also*, that notice was in fact duly given.

To defeat or rebut privilege, the law does not recognise anything short of actual or express malice in the publication of the matter which is charged to be libellus.

The question of the power of the Civil Courts to control the jurisdiction of caste bodies purporting to excommunicate or censure caste offenders was discussed but not decided.

Gobind Das v. *Bishambar Das.* (*Mr. Ameer Ali,*) P. C. ... 103

Limitation Act—Interpretation—First and third columns to be read together—Words in both the columns to be construed in the same sense—*See* Limitation Act Art. 134.... 820

———*Act (XIV of 1859) Ss. 1 Cl. (15) and 18—Limitation Act (IX of 1871, S. 29—Kanom—Redemption—Limitation—Acknowledgment of title after expiry of the period prescribed for redemption but within the period allowed by S. 18 of Act XIV of 1859—Effect of—Rights barred under repealed Act, not revived by later enactment.*

In a suit instituted in 1911, to redeem a *Kanom* of the year 1798, it was found that the period of 60 years fixed by S. 1, Cl. 15, of Act XIV of 1859; expired in 1858 but that there was an acknowledgment of the mortgagor's title in 1861, (*i. e*) within the period of grace of 2 years allowed by S. 18 of that Act.

Held, that the suit was barred by limitation. The words "in the mean-time" in S. 1, Cl. 15, of Act XIV of 1859 refer only to the 60 years mentioned in the first part of the clause and not to the period of grace allowed for a suit by S. 18 of the Act, and the acknowledgment was consequently ineffective to save Limitation.

A right to sue barred under a repealed Limitation Act is not revived by the passing of a new Act in the absence of a provision to that effect in the later enactment.

Raman Kurup v. *Chappan Nair.* (*Spencer and Krishnan, JJ.*) ... 753

Limitation Act—*Contd.* PAGE

———*S.* 2, *cl.* (8) *and Art.* 124—*Office of trustee of devaswom annexed to a Malabar stanom*—*alienation of properties of devaswam by stani*—*Suit for recovery of possession by successor in stanom*—*Limitation.*

The trusteeship of a devaswom and its properties was conferred by the Government on a Malabar *stani* to be held by him and his successors in the *stanom* as a hereditary office descendible in the same manner as the *stanom*. The *stani* purported to transfer absolutely his right of management of the devaswom and its properties to the predecessor's-in-title of the defendants who thereupon assumed control and possession of the same. In a suit by a successor in the *stanom* for recovery of the devaswom properties, instituted more than 12 years after the date of the transfer by the preceding *stani* but within 12 years of the plaintiff's succession to the *stanom*, *held*, that the plaintiff's claim was barred under Art. 124 of the Limitation Act.

A *stanom* according to the customary law of Malabar is descendible from one stanom holder to another in a peculiar line of succession and each successive holder is in the same position as an ordinary one succeeding on intestacy. Stanom-holders on whom property devolves by operation of law derive their title to sue from or through their immediate predecessors within the meaning of S. 2 (8) of the Limitation Act.

Rajah of Palghat v. *Raman Unni.* (*Chief Justice and Seshagiri Aiyar, J.*) 26

———**S. 5** "*Sufficient cause*" *for not presenting an appeal within the period prescribed*—*Whether time spent in applying for review may be excluded in computing the period*—*Mistake of law*—*Whether it may amount to sufficient cause*—*Judicial discretion*—*Duty of Superior Court when it is questioned*—*Abatement of suits*—*Should not be pronounced exparte-procedure in questioning abatement*—*Whether review or appeal is the proper remedy*—*Code of Civil Procedure* (*Act XIV of* 1882) *Ss.* 365, 366, 368, 371, 588—*Substitution of parties in miscellaneous appeal*—*Sufficient for all stages of a suit*

All that S. 5 of the Limitation Act requires in express terms as a condition for the exercise of the discretionary power of admitting an appeal presented after time is sufficient cause for not presenting it within time. The true guide for a Court is whether the appellant has acted with reasonable diligence in prosecuting his appeal and if he has been delayed by prosecuting other civil proceedings, e. g., a review, whether such proceedings were reasonably prosecuted and in good faith.

A mere mistake in law is not *per se* sufficient reason for asking the Court to exercise its discretion under S. 5, but when it has in fact occasioned erroneous proceedings it may be the foundation of an application for the indulgence which may be granted under S. 5.

These rules having been laid down by Full Benches in all the Courts of India and acted on for years, the Privy Council will not interfere with them, whatever the law in England and whatever they might have been disposed to do if the matter were open.

Ramjiwan Mull v. *Chand Mal.* (1888) I. L. R. 10 All. 587 overruled. *Brij Mohan Das* v. *Mannu Bibi.* (1897) I. L. R. 19 All. 348 *Kam Baksh* v. *Daulat Ram.* (1881) P. R. p. 178 F. B. *Brojendra* v. *Coomar Roy.* (1867) 7 W. R. 529 F. B approved.

Limitation Act—*Contd.* PAGE.

If a Judge purporting to exercise discretion does so under the view that there is no general rule, when in fact there is one he misdirects himself, and the Superior Court must either remit the case or exercise the discretion themselves

An order abating a suit is tantamount to a judgment in favour of defendant and should not be pronounced *ex-parte* without notice to the opposite side.

S. 371 of the Code of Civil Procedure, 1882, which gives a remedy by review against an abatement order, is available to a plaintiff whether such order is passed under S. 366 or S. 368. The appeal allowed by S. 588 is intended for other matters than abatement.

When a suit in a District Court was delayed pending disposal by the Chief Court of an appeal against an interlocutory order passed in such suit, and substitution of parties was effected only in the Chief Court in such appeal and not in the District Court.

Held, that the introduction of a plaintiff or defendant for one stage of a suit is an introduction for all stages, and that it was unnecessary to apply to substitute parties in the District Court.

Brij Indar Singh v. Lala Kanshi Ram, (*Lord Dunedin*) P. C. ... 486

——— **Ss. 5 and 29**—Appeals under the Provincial Insolvency Act—Computation of the period of limitation—General provisions of Limitation Act, if applicable in computing the period—*See* Prov. Ins Act, Ss 6, 46 (4) & 47 566

——— **Ss. 6, 7 and 28, Art 44 and 144**—*Guardian and ward—Alienation by guardian—Suit for possession by ward on attaining majority—Limitation—Bar against elder brother, when affects others-Limitation Act, S. 7, Scope of.*

Plaintiff sued in ejectment basing his title on a sale-deed of 1893 executed to him by the mother of defendants 2 and 3, but as guardian of the second defendant alone, the third defendant (the posthumous son of his father) not having been then born. The plaintiff was in possession till 1909 when he was ejected forcibly by the first defendant who had obtained a sale-deed from the second defendant in 1908. This latter sale-deed was executed by the second defendant for himself and also for the third defendant who was then a minor. The second defendant attained majority in 1903, and the third, about the end of 1911 or beginning of 1912. The suit was brougut in July 1912

Held, that the second defendant's right to institute a suit for setting aside the sale of 1893 and for recovery of possession of the property from the plaintiff became barred in 1906 under Art. 44, that thereupon his title to such property became extinguished under S 28 of the Limitation Act and the plaintiff having become the owner of the second defendant's interest in the property in 1906 was entitled to a decree for possession of such interest.

Madugala Latchiah v. *Pally Mukkalinga*, (1907) I. L R. 30 M. 393= 17 M. L. J. 220, followed.

Held further, that the plaintiff's suit as regards the share of the third defendant must be dismissed As the sale-deed of 1893 did not affect the interest of the third defendant he was not bound to have it set aside under Art. 44, and as against him, plaintiff could only rely on Art. 144, subject however to S. 6 of the Limliation Act.

Limitation Act—*Contd.* PAGE

Per *Sadasiva Aiyar, J.* The mere fact that under O 1, R. 1, C. P. Code second defendant suing for himself and praying for one particular remedy could have joined in that same suit another cause of action vesting in the third defendant for whom he could have acted as next friend would not bring such a suit within the ambit of S. 7 of the Limitation Act, which contemplates the existence of a joint cause of action in support of a single suit.

Kandasami Naicker v. *Irusappa Naicker, (Sadasiva Aiyar and Spencer, JJ.)* 309

———S. 14—*Applicability—Execution of decree—Limitation—Execution application praying for transfer of decree—Dismissal because (a) of absence of proof that judgment-debtor had no property within jurisdiction of Court passing decree and (b) application barred by limitation—Subsequent application to same Court for attachment of properties within its jurisdiction — Limitation—Decree-holder if entitled to deduction of time of pendency of prior application.*

On 13th September 1909 an application for execution was made to the District Munsif's Court of Tinnevelly (the Court which passed the decree) praying for a transfer of the decree from that Court to the Ambasamudram Munsif's Court. The application was dismissed on two grounds by the District Munsif—firstly that it was not shown that there was no property of the judgment debtor within the local limits of the Tinnevelly Court and secondly that the application was barred by limitation and the Munsif's order was ultimately restored by the High Court by an order dated 13th February 1913. On a fresh application made on 14th October 1913 to the Tinnevelly Court for attachment of the properties of the judgment debtor within its jurisdiction, *held* that the decree-holder was not, under S. 14 of the Limitation Act, entitled to a deduction of the time between the filing of the previous application and of the date of the High Court's order thereon, in as much as (a) it could not be said that that application was proceeded with in a Court without jurisdiction, that is to say, that the said application was infructuous because it was proceeded with in a court without jurisdiction or on a similar ground within the meaning of S. 14 and (b) the relief sought by the subsequent application was not the same relief which was asked for in the application of 13th September 1909 ... ...

Raghavendra Row v. *Venkatarama Aiyar (Abdur Rahim and Oldfield, JJ.)* 862

———S. 20 and Art 182—*Oral application, when a step-in-aid of execution—Application for execution by decree-holder containing admission of part payment of decree amount—Certificate of payment —Effect on limitation—Civil Procedure Code, O 21. R. 2, scope of.*

When the Civil Procedure Code requires a written application for execution a mere oral application instead is not a step-in-aid of execution, and where a written application is filed as required by the Code, a mere oral repetition of a request contained in the execution application is not a step-in-aid. In order that an oral application may be effective as a step in-aid of execution the application must be one which it is necessary to make in order to get the main reliefs prayed for in the execution petition. It must be of such a nature that, if the application were not made, further proceedings in execution could not be taken either by reason

Limitation Act—*Contd.* PAGE

of the specific prayer not being contained in the execution application or by reason of the Civil Procedure Code or the Rules of Practice requiring some further acts to be done before the main reliefs prayed for in the execution application can be granted or enforced.

Per *Ayling, J.*—Nothing is prescribed in O. 21, R. 2 of the Civil Procedure Code as to the time within which or the manner in which the decree-holder must certify payment. A statement by the decree-holder in his application for execution, of the fact of his having received a portion of the decree amount within 3 years of the application can be accepted as a certificate of payment under O. 21, R. 2 cl. (i) of the Civil Procedure Code. Such a payment would, if proved, operate to save limitation under S. 20 of the Limitation Act.

Per *Kumaraswami Sastri, J.*:—An uncertified payment of a portion of the decree-amount, if made before the expiry of the period of limitation, is sufficient to save a decree from the bar of limitation.

Masilamani Mudaliar v. *Sethuswami Aiyar.* (*Ayling and Kumaraswami Sastri, JJ*) 219

——— *Art.* 36—*Decree in suit for ejectment of tenant in Malabar—Suit by holder of, for compensation for damage done by judgment-debtor to property decreed subsequent to decree—Limitation—Deduction of time spent in prosecuting execution proceedings to obtain same relief—Limitation Act—S. 14—Applicability—Malabar compensation for Tenants Improvements Act—Ss. 5 and 6—Intention of Legislature—Court executing decree in suit for ejectment of Malabar tenant—Jurisdiction to award compensation for damage done by judgment-debtor to suit property subsequent to decree—Estoppel—Inconsistent pleadings in successive proceedings—applicability of doctrine to pleas based on abstract question of procedure law—Scope of.*

Under Ss. 5 and 6 of the Malabar Compensation for Tenants Improvements Act the Court executing the decree in a suit brought for ejectment of a tenant in Malabar has jurisdiction to entertain an application to award compensation to the decree holder for damage done to his property after the passing of the decree. *Held*, therefore, in a suit brought by such a decree-holder against his judgment-debtors to recover compensation for damages done by them between the date of the decree and that of the decree-holder's entry upon the property decreed, that the plaintiff was not entitled under S 14 of the Limitation Act. to a deduction of the time spent by him in prosecuting exeution proceedings to obtain the same relief, notwithstanding that the executing court held that it had no jurisdiction to grant that relief.

Per *Spencer, J.*:—By enacting Ss 5 and 6 of the Malabar Compensation for Tenants Improvements Act, the legislature clearly intended that there should be complete and final settlement between the lessor or mortgagor and his lessee or mortgagee of all that is due from the former to the latter and from the latter to the former up to the date when the transfer of possession takes place and that the subsequent re-opening of accounts between parties whose legal relationship has ceased should be avoided.

The words " any sum of money accruing due for rent or otherwise in respect of the tenancy " in S. 6 of the Act are wide enough to include

Limitation Act—*Contd.* PAGE.

damages for injury done by the tenants to his mortgagor's or lessor's property, even though the money may not strictly be said to accrue due until the value of the damages has been ascertained.

Per Sadasiva Aiyar, J.:—*Quaere* whether the doctrine that a party ought not to be allowed to "blow hot and cold" in pleadings in two successive proceedings involving the same question of rights can be availed of as regards pleas based on a pure abstract question of procedure law.

Jagannadha Rao v *Kurmayya*, (1907) 17 M. L. J. 314. *Manpal* v. *Sahib Ram*, (1905) I. L. R. 27 A. 544 ref. to.

Quaere :—Whether even assuming that the doctrine can be availed of in such cases its effect is to entitle the party taking the first or infructuous proceeding to a deduction of the time taken therein for the purposes of calculating the limitation period for the second proceeding.

Abdulla Koya v. *Kallumpurath Kanaran*, (*Sadasiva Aiyar and Spencer, JJ.*) 463

———**Arts. 61, 120**—*Suit by landholder to recover one-half of road cess paid by him from the ryot—Art.* 120, *whether applies to all cases of statutory liability—Nature of the ryot's obligation to pay road cess—Statutory duty—Madras Estates Land Act, S.* 3 (11)—*Rent—Road cess is rent within the meaning of S.* 3 (11)

A suit by a landholder to recover one half of the road cess paid by him from the ryot is governed by Art. 61 of the Limitation Act.

It is not the law, that wherever there is a statutory liability to pay a sum of money, the article of the Limitation Act applicable for a suit to recover the amount is only Art. 120.

Observations of Petheram, C. J., in *Secretary of State for India* v. *Guru Prasad Dhur*, (1882) I. L. R. 20 C. 51: dissented from.

The obligation to pay road cess on the part of the ryot is a statutory liability under the Local Boards Act. Arrears of road cess payable by a ryot are of the nature of rent within the meaning of S. 3 (11) of the Madras Estates Land Act.

Muthuramalinga Sethupathi v. *Mahalinga Raju*, (*Seshagiri Aiyar, J*). 379

———**Art. 97**—Contract with Municipality for collection of rents of stalls—Deposit in pursuance of—Contract falling through—Suit for recovery of deposit or of balance thereof—Limitation-Starting point. *See* C. P. Code, O. 33 R. 5 (d) 577

———*Art.* 113—*Specific performance—Suit for, by third party to contract claiming as beneficiary thereunder—Contract to be performed on a contingency—Limitation—Starting point—Limitation Act—Beneficial construction.*

A entered into a contract with B, whereby it was agreed that as soon as B. paid a certain specified sum to A, the latter was to assign a decree in his favour to C. In a suit by C. against A for specific performance of the contract by the execution of an assignment deed, *held* that the second part of Art. 113 of the Limitation Act applied to the case and limitation began to run from the date on which A. refused to perform the contract and not from the date on which B. made the payment stipulated by the contract.

Quære: Whether the second part of Art. 113 and not the first, would apply even if the suit had been instituted by B?

Limitation Act—*Contd.* PAGE.

The Limitation Act being an enactment which operates as a bar to a claim which is legally enforceable, should be construed as much as possible in favour of the person whose right is sought to be barred.

Sathula Venkanna v. *Namuduri Venkatakrishnayya* (*Ayling and Napier, JJ.*) 35

———**Art 120**—Suit by landholder to recover one-half of road cess paid by him from the ryot—Art. 120 not applicable but only Art. 61 —*See* Lim. Act art 61 and 120 379

———**Art. 124**—Office of trustee of devaswom annexed to a Malabar stanom—Alienation of devaswom properties by stani—Suit for possession by successor—Limitation—*See* Limitation Act, S. 2 (8) and Art. 124. 26

———**Art. 134**—*Applicability—Transfer under which possession not taken by transferee—Suit by mortgagor or cestuique trust to recover property from—Limitation—Starting point, date of transfer or date on which possession is taken by transferee—Object of Article—Interpretation of articles of Limitation Act based on circumstance of their being printed in separate columns — Permissibility—Periods of suspension when can be allowed under Act—Residuary articles—Function of — Statute — Interpretation— Hardship—Considerations of —Propriety*

Held, by *Abdur Rahim, Seshagiri Aiyar and Srinivasa Aiyangar, JJ.* (*The Chief Justice and Coutts Trotter, J*, dissenting): Art. 134 of the Limitation Act is inapplicable to a transfer from a trustee or mortgagee under which possession is not taken by the transferee.

Held, by *The Chief Justice, Coutts Trotter and Srinivasa Aiyangar, JJ.* (*Abdur Rahim and Seshagiri Aiyar, JJ.*, dissenting): In the view that art. 134 is applicable to a transfer under which possession is not taken by the transferee at the time of the transfer, the starting point of limitation is the date of the transfer and not the date when possession is taken by the transferee.

Per The Chief Justice :—The intention of the legislature in Art. 134 was not to make a provision in favour of the cestuique trust or mortgagor and give him a further period than he would otherwise have had; on the contrary, the intention was clearly restrictive.

No argument can be founded on the fact that the articles of the Limitation Act are printed in three columns.

Under the Indian Limitation Act Courts are not at liberty to allow periods of suspension not provided for therein. It is equally inadmissible under the Act to say that time shall not begin to run from the time limited in the article except under some express provision of the Act.

Per Abdur-Rahim and Seshagiri Aiyar, JJ. :—It is a well-known rule for construing the Indian Statute of Limitation that the first and the third columns must be read together and that the words appearing in one of the columns should be given the same meaning as in the other columns.

Per Seshagiri Aiyar, J :—Art 134 is in the nature of an exception to art 148 which provides for ordinary cases of redemption and its object is to afford protection to the person in possession. The article should therefore be construed liberally in favour of the legal owner and strictly against the transferee. Wherever both the 1st and 3rd columns of an article of the Limitation Act are not applicable to a case, the residuary articles must be applied. The function of the residuary articles is to

Limitaton Act—*Contd.* PAGE

provide for cases which could not be covered by the exact words used in both the columns of an article.

Per Srinivasa Aiyangar, J. :—In construing the articles of the Limitation Act undue stress ought not to be laid on the first column of the article which describes the nature of the suits and it ought not to be held that all suits of that class must be governed by that article, though the starting point fixed in the third column cannot be applied at all or cannot be applied without working injustice.

Per Coutts Trotter and Srinivasa Aiyangar, JJ. :—Hardship or no handship if the language of a statute is plain, courts are not entitled to take liberties with it under the guise of construing it.

Mulla Vittil Seeti Kutti v. *Kunhi Pathumma.* (*The Chief Justice, Abdur Rahim, Coutts Trotter, Seshagiri Aiyar and Srinivasa Aiyangar, JJ.*) F.B. 320

———**Arts. 134 and 144**—Mutt—Alienation of properties by head of mutt—Suit to set aside alienation and for possession by the disciples of the mutt-Limitation—See Religious Endowment 357

———**Arts. 181 and 182**—*Application for restitution—Article applicable.*

An application for restitution is an application for execution of a decree and is governed by Art 182 and not by Art. 181 of the Limitation Act.

Sultan Sahib Marakayar v. *Chidambaram Chetti* (1909) I. L. R. 32 M. 136, distinguished.

Venkayya v. *Raghavalu* (1897) I. L. R. 20 M. 448, *Somasundaram Pillai* v. *Chokkalingam Pillai* (1917) I. L. R. 40 M. 780, *Gopala Menon* v. *Anujan Rajah* (1911) 22 M L. J. 146, *Asutosh Goswami* v. *Upendra Prasrd Mitra* (1916) 21 C. W N 564, referred to

Unnamalai Ammal v. *Mathan* (*Abdur Rahim and Kumaraswami Sastri, JJ.*) 413

———Art. 182—Application for restitution governed by—See Lim. Act, Art. 181 and 182 413

———**Art. 182 (5) (6)**—*Decree of British Indian Court—Execution—Transmission to Travancore Court for—Jurisdiction of Court passing decree—Application to British Indian Court to send record of suit to Travancore Court for execution if falls under Art. 182 of Limitation Act—Limitation Act—Applicability in Travancore "Application in accordance with law to proper court for execution" Meaning—"Notice to show cause why decree should not be executed"—What is.*

Courts in British India have no power to send their decrees for execution to the Travancore Courts, but may and should send to these Courts the documents they require to enable them to execute these decrees under the powers conferred upon them by the legislative authority in Travancore.

An application to a court in British India to send to the Travancore Court the documents required by it to enable it to execute a decree of a British Indian Court under the authority of the Travancore legislature does not fall within art. 182 of the Limitation Act so as to afford a fresh starting point of limitation for the execution of the decree.

Limitation Act—*Contd.* PAGE

Per The Chief Justice: The Indian Limitation Act extends only to British India and has no operation *proprio vigore* in Travancore And an application 'in accordance with law to the proper Court for execution' in the third column of cl. 5 of art. 182 of the Limitation Act means an application in accordance with the provisions of the law in British India to be found in the Code of Civil Procedure to which the article refers or elsewhere. An application to the Travancore court to execute the decree of a British Court under powers conferred upon it by the legislative authority in Travancore is therefore not an application "in accordance with law" within the meaning of the clause.

Where on an application to a Court in British India to send the records of the decree of a British Indian Court to the Travancore Court to enable it to execute the decree under the authority of the Travancore legislature a notice is issued to show cause why the decree should not be executed, the notice is not one required by the Code of Civil Procedure, 1908, so as to bring the case within Cl (6) of art. 182 of the Limitation Act.

Pierce Leslie & Co. Ltd v. *Perumal* (*Chief Justice, Oldfield and Kumaraswami Sastri, JJ.*) *F. B.* 130

———**Art. 182 (5)**—Oral application, when a step in aid of execution —*See* Limitation Act, S 20 and art. 182 219

———**Art 183**—*Original Side decree—"Revivor"— Doctrine of— Origin—Order of "revivor" under S.* 248 *of the Civil Procedure Code of* 1882 *against one defendant—Effect on other defendant to whom no notice went —Provisions of Arts.* 182, 183 *compared.*

As regards the revivor of Original Side decrees notice must go to the parties against whom it is sought to revive the decree. *Held*, therefore that an order of revivor of a decree on the Original Side made against one of the defendants to whom no notice went

Observations on the origin of the doctrine of "revivor".

Provisions of Arts. 182 and 183 of the Limitation Act on the point compared.

Krishnayyah v. *Gajendra Naidu* (*The Chief Justice and Oldfield, J*). 523

Madras Court of Wards Act (I of 1902), S. 35—*Court of Wards—Powers of alienation over estate—Ward having only limited right under Hindu Law—Effect —Hindu Law—Widow—Alienation—Conversion of rent payable in kind into money rent—Validity—Reversioner—Suit for declaration of reversionary right—Maintainability — Conditions— Evidence Act, S.* 35—*Copies of actual letters made in registers of official correspondence kept for reference and record—Admissibility— Probative value of.*

The power to sell, mortgage or lease given to the Court of Wards by S. 35 of the Court of Wards Act is in terms absolute and is not governed by the restriction in the later part of the section. The Court of Wards superintending the estate of a ward under the Act is not, as regards its powers of alienation over the estate, subject to the same restrictions to which the ward is under the Hindu Law subject. The word "property under its superintendence" in S. 35 means the moveable and immoveable property itself and not the particular interest of the ward as widow.

Madras Court of Wards Act—*Contd.* PAGE

Where the Court of Wards entered into compromises by which on payment of rents reserved the tenants were allowed permanent rights of occupancy at fixed rents, *held* that, assuming that the transactions amounted to sales of the kudivaram or occupancy right, the alienations, were covered by the first part of S 35 and that in any case they were covered by and were also within the powers conferred by the second part.

The conversion of rents payable in kind into money rents is within the powers of a limited owner such as a widow.

Reversioners are not entitled to sue for a declaration that they are the next reversioners unless the decision of that question is incidental to the grant of some other relief to which they may be entitled.

Janaki Ammal v. *Narayanasami Aiyar:* (1916) I. L. R. 39 M. 634=31 M. L. J. 225 (P. C.) followed.

Copies of actual letters made in registers of official correspondence kept for reference and record are admissible under S. 35 of the Evidence Act as reports and records of acts done by public officers in the course of their official duty and of statements made to them. They are entitled to great consideration in so far as they supply information of material facts and also in so far as they are relevant to the conduct and acts of the parties in relation to the proceedings of Government founded on them.

Navaneetha Krishna Thevar v. *Ramasami Pandia Thalavar.* (*The Chief Justice and Burn, J.*) 277

Madras Estates Land Act, S. 3 (2) (d)—*Suit by agraharamdars against tenants—Proof—Onus—Suit lands granted by Zemindar prior to Inam settlement—Interest conveyed—Presumption—Grant—Construction—"Land-revenue"—Grantee's right under presettlement Inam grant by Zemindar if* prima facie—*S. 8 Exception—"Acquisition of kudivaram by transfer etc.—Presumption—Grounds—Inamdar excluding tenants from acquiring kudivaram and claiming kudivaram in himself for several years—Effect.*

Where certain agraharamdars, alleging to be owners of both varams in the lands in a village by virtue of a grant thereof in 1796 under a gift deed executed by a Zemindar, its then owner, sued to eject the defendants (tenants) and it appeared that the grant deed itself indicated that there were inhabitants residing in the village at the time of the grant and that, though it included the Ashtabogam, it excluded Savaram or home-farm lands from the gift; *held*, that (1) the grant was only of the "land revenue" alone within the meaning of S. 3 (2) (d) of the Estates Land Act and not of the "kudivaram" also and (2) the onus lay on plaintiffs of proving that the grant was of the kudivaram also and not on defendants of proving that the suit lands were part of an estate.

Per Sadasiva Aiyar, J:—In all cases of grants of inam the presumption is that the grant is only of the melvaram, unless the grant deed clearly confers kudivaram rights also.

What the zemindar was, prior to the Inam Settlement, entitled to obtain from the lands as a feudal landlord was connected by the word "land-revenue", though, now, it would be called melvaram. Pre-Settlement Inams granted by Zemindars might therefore be well considered as merely grants *prima facie* of land revenue within the meaning of S. 3 (2) (d) of the Estates Land Act.

Madras Estates Land Act—*Contd.* **PAGE**

The fact that the inamdars prevented their tenants from acquiring kudivaram and claimed kudivaram in themselves for several years can be used to infer that the agraharamdars were entitled to kudivaram at the time of the grant but will not of itself give rise to a presumption of the acquisition by them of such right by means of transfer, succession, or other modes *ejusdem generis*.

The broad proposition of Miller, J. in *Ponnuswami Padayachi* v. *Karuppudayan*, (1914) 26 M. L. J. 255 that the inamdar must be held to have the occupancy right when the tenants had no occupancy rights in themselves dissented from

Mugadasu Venkatadasu v. *Venkamanidi Udayanarayan*, (*Sadasiva Aiyar and Spencer JJ.*) 548

——S. 3 (11)—Road cess—Rent—*See* Limitation Act. art 61 and 120 37

——**Ss. 3 (11) and 30 (2), (3) and (4)**-*Agreement between Government and Zemindar localising lands for which latter entitled to Government water free of assessment—Water rate paid to Government prior to, in respect of such lands—Zemindar's right to, without assignment in his favour—Payment if "rent" within meaning of S. 3 Cl. (11)—Payment not " enhancement within meaning of S. 30 cls. 2, 3 and 4 - Sanction of Collector not necessary to entitle Zemindar to recover it.*

Where by an agreement between the Government and the Zemindar lands to which the former are bound to supply water free of assessment are localised, the Zemindar becomes entitled to the water rate paid till then to Government for Government water taken by the owner of such lands. An express assignment of the right to collect the rate in favour of the Zemindar is not necessary. The payment to which the Zemindar be - comes so entitled is rent within the meaning of the Estates Land Act and the sanction of the Collector is not necessary to entitle him to recover it because there is no question of enhancement in such a case.

Battina Appanna v. *Raja Yarlagadda.* (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) 355

——**Ss. 9, 153 and 163** —*Old waste —Suit by landlord to eject a non-occupancy ryot—Forum.*

A suit in ejectment against a non occupancy tenant of old waste holding under a lease granted before the passing of the Estates Land Act, but which expired after the Act came into force, is maintainable only in the Revenue Court.

Yellikepalli Venkayya v. *Venkatramayya Apparao.* (*Abdur Rahim and Bakewell, JJ*). 757

Madras Estates Land Act, S. 26—Objection to validity of Contract not covered by S. 26—Jurisdiction of Revenue Court to decide—*See* Jurisdiction 599

——**Ss 153 and 163**—Old waste—Suit by landlord to eject non-occupancy tenant holding under a lease before the Est. Land. Act -Forum —Revenue Court—*See* Madras Estates Land Act, Ss 9, 153 and 163. 757

Madras Irrigation Cess Act, (VII of 1865) Ss. 1 and 2—*River or stream belonging to Government—Irrigation—Extent of inamdar's right of user—Cultivation of excess area—Water cess, levy of, when justifiable—Madras Land Encroachment Act (III of 1905) S. 2, Scope of—Nature and extent of riparian rights of private persons—Inam title-*

Madras Irrigation Cess Act—*Contd.*

deed—Besides 'poramboke,' construction of—River-beds if included in grant.

The Government claimed under Madras Act VII of 1865 to levy water-cess upon certain inam lands in so far as the user of Government water for irrigation exceeded the user at the time of the Inam Settlement. The main source of irrigation for the inam lands was a non navigable river, a considerable portion of whose course including the point where the channel which actually irrigated the lands in question took off, lay within the Inam limits. It was in evidence that the river also irrigated certain *ryotwari* lands below the point where the Inamdar's channel branched off and that a small hill stream flowing through ryotwari land emptied itself in the river. It was found that since the date of the Inam settlement 83 and odd acres of land had been added to the area of wet cultivation by the Inamdar. It was also found that the Inamdar was not actually drawing more water than what he and his predecessors-in title had been taking from time immemorial; that the present system of irrigation had been in existence from before the Inam settlement; that the Inamdar was using the existing system of irrigation in the same way as his predecessor was using at the time of the Inam settlement; and that the Government had not spent anything so far as the irrigation system of the Inam lands was concerned.

Held that in the circumstances of the case, the claim of the Government to levy water cess on the excess area brought under cultivation since the Inam settlement was untenable.

Authorities on the point considered by Abdur Rahim, J.

Per *Abdur Rahim, J.*—By the words "standing and flowing water" in S. 2 of Madras Act III of 1905, is meant the water and the land on which it stands or over which it flows, the whole taken together collectively and not the mere liquid apart and separate from the land. The scope of the section is only to declare that certain classes of properties which do not belong to any individual private proprietor belong to the Government and not to cast the onus of proof on any person whose right to the subjects of property mentioned in S. 2 is contested by the Government. Each proprietor of the adjacent land has a right to the usufruct of the stream which flows through it and in that sense the stream is the common property of all the riparian proprietors. If the Government happens to be a riparian proprietor, it has got a right to the usufruct of the river in the same way as other riparian proprietors. Madras Act III of 1905 does not lay down that even in those streams and rivers in which the riparian rights of Zemindars or other owners of adjacent lands exist, a separate and independent proprietary right in the water subsists in the Government entitling it to demand from the owners of the lands on the banks any price it chooses for the use of the water.

Nature and extent of the rights of riparian owners in India, considered.

The question whether the use of the phrase "besides poramboke" in an Inam title-deed includes also the river-bed in the grant, is one mainly of interpretation, depending on the character and size of the river, the extent of the grant and the surrounding circumstances.

The Secretary of State for India v. Ambalavana Pandara Sannadhi. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) 5

Madras Irrigation Cess Act—*Contd.* PAGE.

———Ss. 1 and 2—*Watercess, Levy of-Irrigation-Permanent Settlement —Extent of zemindar's or inamdars's right of user under engagement with Government—River or stream belonging to Government—"Free of separate charge"—"Standing and flowing water"—Madras Act III of* 1905, *S.* 2.

The Government claimed under Madras Act VII of 1865, to levy water cess upon permanently settled lands (zeraiti and inam) in so far as the user of Government water for irrigation exceeded the user at the time of the permanent settlement, whether in respect of the area irrigated or in respect of the fact that two crops were raised instead of one.

It was held by the Privy Council, agreeing with the Courts below, that the effect of the permanent settlement was to vest the then existing irrigation channels in the zemindars through or within whose zemindaries the same respectively passed or were situate.

It was also held by the Privy Council (in this, differing from the Courts below) that the right of user from such irrigation channels which passed by the permanent settlement could be measured only by the physical conditions existing at that time and not by the extent to which the water was in fact used; and that assuming the river with which the channels connected belonged to the Government the zemindar's right of taking water from it was limited only by the size of the channels and the nature of the sluices and works by which water was diverted from the river into the channels, the Government could not complain if the amount of water taken were within this limit. Once the water was lawfully taken into the channels, Government had nothing further to do with the water.

Whether or not there are other cases which the first proviso to S 1 of Madras Act VII of 1865 was intended to meet, it at least covers the case of engagements with the Government arising out of the permanent settlement If by virtue of such settlement a zemindar is entitled to take and use water from any such source of supply as mentioned in the Cess Act and this right is part of or appurtenant to the property in respect of which he pays a single jumma or peishcush, no cess can be levied under the Act in respect of water which he is entitled to take and use.

Semble, that the second proviso is intended similarly to safeguard the Ryots' rights under the periodical temporary settlements.

Kandukuri Balasurya Prasada Row v. Secretary of State for India. (*Lord Parker of Waddington*) P. C. 144

Madras Land Encroachment Act. (III of 1905) S. 2, scope of—Nature extent of riparian rights of private persons—effect of the section on onus of proof—*See* Madras Irrigation Cess Act Ss. 1 and 2 415

Madras Permanent Settlement Regulation (XXV of 1802)—Effect of Issue of sanad—Right of Zemindar to irrigate whole of the lands, free of liability to pay water-cess—*See* Madras Irrigation Cess Act (VII of 1865) Ss. 1 and 2 144

Mahomedan Law—Waqf—Muttwalli—Appointment of, under a scheme —Minor disqualified for appointment—*See* Election ... 348

Malabar Compensation for Tenants Improvements Act (1 of 1900), S. 5—*Tenant to whom " compensation is so due"—Meaning—Tender of mortgage amount into Court—Amount found to sufficiently cover compensation for improvements—Liability of mortgagee tenant for*

Malabar Compensation for Tenants Improvements Act—*Contd.* PAGE

mesne profits from date of tender—Statute—Interpretation—Principles—Reasonableness or otherwise of construction—Object and Preamble of Act—Proceedings in Legislative Council—Reference to—Legitimacy of—Condition.

Compensation for improvements remains due to the tenant within the meaning of S. 5 of the Malabar Improvements Act (I of 1900) till he is actually paid or (if he would not take it though tendered or paid into court) till he is ejected in execution of a decree or order of court after the payment of the amount into court in pursuance of an order under S 6 (1) and (3) of the Act.]

Held, therefore that a mortgagee-tenant to whom the Malabar Compensation for Tenants Improvements Act applied was not bound to pay mesne profits from the date of tender of the amount due under the mortgage into court even when it was found that the money so tendered sufficiently covered the compensation for improvements, *Chami* v. *Annu Pattar* (1916) M. W N. 160. not followed.

Per Sadasiva Aiyar, J:—The question of unreasonablenes of construction is relevant in considering the meaning of a statutory provision only where the language is reasonably capable of two constructions, one reasonable and the other unreasonable and not where it is quite plain.

Where, however, there is some ambiguity in an Act, the preamble and the object of the Act can be referred to. In such a case reference may also be made to the proceedings connected with the Act in its passage through the legislature. Where the language of the Act is quite plain reference cannot be made to such proceedings.

The Administrator General of Bengal v. *Prem Lal Mullick* (1895) I. L. R. 22 C. 788 799, (800) P. C. distinguished.

Parameswara Ayan v. *Kittunni Valia Mannadiar.* (*Sadasiva Aiyar and Phillips, JJ.*) 591

——**Ss. 5 and 6**—Court, executing decree in suit for ejectment of Malabar tenant—Jurisdiction to award compensation for damage done by judgment-debtor to suit property subsequent to decree—*See* Limitation Act Art. 36 469

Malabar Law—Stanam—Alienation of properties by Stani—Suit for recovery of possession by successor in stanom—Limitation—*See* Limitation Act S. 2 (8) and Art. 124 26

——*Stanam—Melcharat by stani when binding on successor.*

A melcharath for 12 years granted by a Stani is *prima facie* binding on his successor, but it may be avoided on proof that it was not granted in the ordinary course of business, or that proper and reasonable rent was not reserved

Cases on the subject considered.

Anantanarayana Iyen v. *Patinhare Kovilakath Thiruveerarayan.* (*Ayling and Napier, JJ.*) 453

——*Verumpattam, incidents of—Lease for a year unless otherwise specified—Notice to quit—Whether six months notice necessary Assignment of lessor's interest Notice to a tenant—Subsequent suit by original lessor against tenant—Decree for rent—Assignment not pleaded in defence—Whether decree bars suit by assignee for rent.*

Verumpattam is a lease which runs only for a single year unless other-

Malabar Law—*Contd.* PAGE

wise specified. At the end of the year the landlord is at liberty either to renew the lease or let the land to another tenant. The period of twelve years presumed in the case of a Kanom has no application to Verumpatam.

A Verumpattam lessee is not entitled to a six months' notice. In the absence of any statutory provision he is only entitled to a reasonable notice which is a question of fact to be decided in each case according to the particular circumstances and the local custom as to reaping of crops and cultivating land.

Where a lessor assigns the whole or any portion of his interest and the assignee gives notice of such assignment to the tenant any decree for rent, in favour of the original lessor againt the tenant in a suit to which the assignee is not a party will not preclude the assignee to recover rent for that period from the tenant if the latter did not plead the assignment as a defence to the original lessor's suit for rent.

Gangadharan Pattar v. Patinhara Kovilakath Manavikraman. (Ayling and Napier, JJ.) 512

Minerals—Mokuraridar—Pattah with all rights—No right to Minerals—See Landlord and Tenant 687

Mortgage—Decree—Application for personal decree—Jurisdiction only to Court which passed the original decree and not to the Court executing on transfer of decree—*See* C. P. Code O. 34 R. 6 382

———*Decree for sale before New Code—Decree a combined one directing recovery of amount by sale of mortgaged property and decreeing payment of deficiency by defendant—Validity—Question if can be raised in execution proceedings—Separate decree or order under S. 90 of T. P. Act if necessary in such a case—Application to enforce claim for deficiency by execution—Grant of, after notice—Finality as regards executability of decree—Recovery of deficiency—Limitation for—Starting point—C P. Code, S. 48, Effect.*

Held. that a mortgage decree passed before the present Code of Civil Procedure came into force in the form of a combined decree directing the payment of a certain sum on or before a certain date and the sale of the mortgaged properties in default and also decreeing the payment by the defendant of any deficiency that might arise by reason of the sale proceeds being insufficient to satisfy the decree was irregular but it was not open to the judgment-debtors to raise the question in execution proceedings.

Held further, that it was not necessary in such a case to obtain another separate decree or order under S. 90 of the Transfer of Property Act; that when, in such a case, an application to enforce the decree-holder's claim for the deficiency by execution was once filed and execution was ordered after notice to the judgment- debtors, the order was final and it could not be contended in subsequent execution proceedings that the decree was not executable owing to the want of a final decree, and that the 12 years period of limitation under S. 48, C. P. C. for recovery of the deficiency ran from the date when the remedy against the mortgaged properties was exhausted.

Narayana Aiyar v. Singaravelu Vannian. (Abdur Rahim and Kumaraswami Sastri, JJ.) 548

———Interest—Contract rate till the date fixed in the decree for repayment of the mortgage money. *See* Deed, Constuction ... 679

Mortgage—*Contd.* PAGE

———Redemption—Clog on—Combination of simple and usufructuary mortgages—Condition that mortgagee should hold the properhy as owner on non-payment within a certain time, unenforceable—*See* Transfer of Property Act, S. 98 316

Partnership—*Contribution, suit for, as between partners, when maintainable—Dismissal of suit—Interference in revision.*

Plaintiff's assignor and the defendant, who were sole partners in trade, borrowed money from a stranger for partnership purposes. The creditor obtained a decree against both the partners but the whole of the decree amount was paid only by the plaintiff's assignor who transferred to the plaintiff his alleged right of contribution against the defendant. In a suit by the plaintiff for such contribution, it was found that the partnership between the plaintiff's assignor and the defendant was still subsisting, that if accounts were taken between the plaintiff's assignor and the defendant, nothing would probably be due to the plaintiff's assignor, and that the assignment to the plaintiff was made by his assignor in order to get over the difficulty of himself obtaining a decree against his co-partner.

Held that, in the circumstances of the case, there was no ground for departing from the general rule that one partner cannot sue another except for a dissolution and the taking of the general accounts of the partnership and that, the suit having been dismissed by the Court below, there was no ground for interference by the High Court in the exercise of its discretionary jurisdiction under S. 25 of the Provincial Small Cause Courts Act.

Damodara Shanabhog v. Subraya Pai. (*Sadasiva Aiyar, J*) ... 509

Penal Code S. 199—Offence under—Reckless statements not meant to mislead—Sanction for Prosecution, inexpedient. *See* Cr. Pro. Code, S. 195 545

———**S. 370**—*Buying, selling or disposing of a person as a slave—"Slave" in S. 370 meaning of—Instrument disposing of a certain person, his heirs and their services—surrounding circumstances to be taken into account in judging of the nature of the transaction and intention of the parties.*

Where a person executes to another a document in these terms: "I execute to you and give you to-day Janmam deed giving you V with his heirs. The sum I received from you in cash to-day is Rs. 10. For this sum of Rs. 10 you should get work done for you by the aforesaid V and his offspring that may come into being as your Janmam (property) and act as you please."

The question whether this amounts to a sale of V as a slave has to be determined not merely with reference to the language of the document but with reference to the evidence and conduct of the parties, the consciousness and conduct of V himself a grown-up person being taken into consideration.

Held, per Napier and Ayling, JJ., (*Abdur Rahim, J.*, dissenting) that the terms of the document along with the conduct of the parties established that V was sold as a slave and that an offence under S. 370 was committed by the parties to the document.

Per Abdur Rahim, J.—The minimum requirement of the status of slavery under S. 370, Indian Penal Code, would seem to be that absolute power should be asserted over the liberty of the slave and on his personal

Penal Code—*Contd.* PAGE

services. The statement in *Empress of India* v. *Ram Kuar* (1880) I L R 2 A 723 FB cited with approval in *Amina v. Queen Empress* (1884) I. L. R. M. 277 at 279. that S. 370 and the cognate sections of the Indian Penal Code " were enacted for the suppression of slavery not only in its strict and proper sense *viz.*, that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another" but in any modified form where an absolute power is asserted over the liberty of another " followed

His Lordship after an examination of the evidence and the conduct of the parties came to the conclusion that only the relation of master and servant was created between V and the parties to the instrument.

Per Napier, J.—' Slavery ' i S 370 does not connote an absolute and unlimited power over the life of another. Observations to the contrary in *Amina* v. *Queen Empress* (1884)I L R 7 M 277. diss. from.

On an examination of the history and conditions of Cherumas to which class V belonged, his Lordship came to the conclusion that the conditions of service imposed by the document brought the case within S. 370 of the Indian Penal Code.

Per Ayling, J:—' Slavery ' in S. 370 includes something very far short of slavery in its most extreme forms wherein the master has absolute and unlimited powers over the life, fortune and liberty of the slave.

Amina v. *Queen Empress* (1884) I L R 7 M 277 and *Empress of India* v. *Ram Kuar* (1880) I L R 2 A 723 followed.

On an examination of the circumstances of the case andthe terms of the document, His Lordship came to the conclusion that an offence under S. 370 *Koroth Mammad* (In re *Ayling, J.*) was committed. ... 430

——S. 441 and 448—*Trespass by person with knowledge that his act is likely to cause annoyance or insult but without any intention to intimidate insult or annoy the person in possession—Act, if an offence.*

A person who enters into property in possession of another or remains there with an intent other than to intimidate, insult or annoy him or to commit an offence but with the knowledge that his act is likely or certain to cause annoyance or insult to the person in possession, is not guilty of an offence under S. 448 of the Indian Penal Code.

Per *Ayling, J*:—A mere knowledge that the trespass is likely to cause insult or annoyance to the owner of the property does not amount to an intent, to insult or annoy within the meaning of S. 441, I. P. C. but where the trespasser knows that his trespass is practically certain in the natural course of events to cause insult or annoyance to the owner of the property, it is open to the court to infer an intent to insult or annoy. It is a question of fact whether this presumption of intent is displaced by proof of any independent object of the trespass.

Vullappa v. *Bheema Row*, (*The Chief Justice, Ayling and Kumaraswami Sastri, JJ*) 729

Practice—Fees certificate—High Court directing each party to bear his own costs—Reversal of order as to costs by Privy Council—Filing of fees certificate after decision of Privy Council, for costs incurred in High Court—*See* C. P. Code, O. 45 R. 15 ... 300

Presidency Small Causes Courts Act—*See* Small Cases Courts Act ... 539

Presumption —Permanent tenancy—Debutter property—No presumption of grant of occupancy right—*See* Landlord and Tenant ... 84

Presumption—*Contd.* Page

———Tenancy—Unregistered lease for a term of years—Tenant in possession paying rent monthly—Presumption of monthly tenancy—*See* Trust 684

Privy Council—Criminal Appeal—Interference, limits of—*See* Criminal Procedure Code S. 172 555

Promissory note—*Executor, execution by—Debt under note borrowed* bona fide *in course of due administration—Creditor's rights—Right of direct recourse against estate—Right to be subrogated to executor's rights—Suit on promissory note—Right to subrogation if and when can be allowed in—Necessary allegations in plaint—Promissory note by executor, trustee, guardian or agent—Executant when personally liable under, and when not—Promissory note for debt—Suit on debt—Maintainability—Debt and note contemporaneous—Effect—Practice—Pleadings—Prayer for larger relief—Lesser relief to which plaintiff found entitled when will be granted and when not.*

In a suit on a promissory note executed by an executor for a debt borrowed by him *bona fide* in the due course of administration of the estate, the creditor cannot have any direct claim against the testator's estate and cannot have anything higher that a claim to be subrogated to the right of the executor to retain or receive amounts from the estate necessary to indemnify the executor against loss. This claim to be subrogated is, however, of no value if the executor had no such right to retain or receive any amounts from the estate; in other words, if it could be shown that the executor has to account to the estate for a sum not less than that in respect of which he has the right to be indemnified.

Plaintiff sued to recover Rs. 4,534 and odd due under a promissory note executed by the deceased, K, the widow and executor under the will of one N. In the suit four persons were made defendants, being another widow, two daughters, and a daughter's son of N The case for plaintiff was that the suit note was executed in respect of moneys borrowed by K *bona fide* in the due course of administration of the estate of N and that defendants 1 to 4 who had taken the testator's property and defendants 2 to 4 who had succeeded to K's properties were liable

Held, by *Sadasiva Aiyar and Kumaraswami Sastri*, JJ., that plaintiff had no direct right to proceed against the estate and that his only right was to be subrogated to the rights of K.

The learned Judges, however, differed on the question whether, in the suit as framed, plaintiff ought to be allowed to claim to be subrogated to K's right and whether the suit ought to be remanded for deciding whether K had lost her right to reimbursement out of the estate in respect of the amount of the promissory note sued on.

Held by Sadasiva Aiyar, J, whose opinion prevailed under S. 98 of the Code of Civil Procedure, plaintiff ought not to be allowed to do so because (a) the plaint did not say that K had any claims against her husband's estate and did not pray that by reason of her right to indemnity, N's heirs should be made liable to plaintiff for that indemnity amount to the extent of the assets of that estate in their hands and (*b*) the plaint allegations that K was executrix and borrowed under the suit note *bona-fide* in the due course of administration of the estate were insufficient to justify the passing of a decree against the estate or the heirs of N.

Promissory note—*Contd.* Page

Quære whether the Indian Procedure allowed such a claim against N's heirs to be joined to and tried in the suit brought on the promissary note against K's heirs.

Held by Kumaraswami Sastri, J: plaintiff's claim ought to be allowed because (*a*) the merits were all in plaintiff's favour, (*b*) all persons claiming under the will of N or in any way interested in the estate were parties to the suit, (*c*) a separate suit might be barred, and, (*d*) the Indian procedure did not prevent the question from being enquired into and determined as an issue in the suit as framed.

A party claiming a larger relief ought not to be denied relief which can properly be granted unless the ground on which the lesser relief can be granted is in-consistent with the case of the plaintiff as set out in the pleadings or would lead to the determination of issues which would embarrass the defendants or necessitate the addition of parties or unless the claim of the plaintiff is unconscionable and the court is unwilling to stretch a point in his favour.

Per *Sadasiva Aiyar, J*: Where a loan is practically contemporaneous with and is, when made, intended to be evidenced by a promissery note, a suit on the debt apart from the promissory note is not sustainable.

In a suit on a promissory note executed by a trustee or an executor who does not however sign as trustee or executor, there can only be a personal decree against the executant, or, if the executant is dead, against his or her legal heirs, and there cannot be a decree against the trust estate or the testator's heirs.

Per *Kumaraswami Sastri, J*: A person executing a negotiable instrument will be personally bound thereby unless there is clear indication that he does not intend to incur any personal liability but limits recourse of the payee or holder to the person whom or the estate which he represents either as trustee, executor, guardian, or agent.

Quaere as to the words or recitals necessary for so limiting liability. *Ammalu Ammal* v. *Namagiri Ammal.* (*Sadasiva Aiyar and Kumaraswami Sastri JJ.*) 631

——*Right to sue on—Note in favour of person as trustee—Payee subsequently succeeded by another as trustee—Subsequent trustee's right to sue on note without endorsement or assignment—Trust Act, S. 75—Principle of—Applicability to public trusts.*

Where a promissory note is executed in favour of a person as trustee of a charity and subsequently that person ceases to be trustee and is succeeded by another the latter is entitled to sue on the note without any assignment or endorsement

The principle of S. 75 of the Trusts Act. II of 1882, is applicable to public trusts.

Ramanadhan Chetty v *Kathan Velan*, (*Ayling and Seshagiri Aiyar, JJ*) 627

Provincial Insolvency Act, Ss. 6, 46 and 47—*Period of limitation fixed by the Act for petitions and appeals—Applicability of the general provisions of the Limitation Act to—Limitation Act, Ss. 5 to 25 and 29—"Affect the period of limitation" meaning of—Necessity for legislative interference.*

Provincial Insolvency Act—*Contd.* Page

Recourse cannot be had to the general provisions of the Limitation Act (IX of 1908) in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act.

Abu Bucker Sahib v. *Secretary of State for India* (1909) I. L. R. 34 M. 505 followed.

Whenever an attempt is made to construe a special period fixed by an enactment with reference to the general provisions of the Limitation Act, the effect of such a process would be " to affect the period of limitation ' fixed by that enactment within the meaning of S. 29 of the Limitation Act.

The necessity for legislative interference pointed out.

Kopparthi Lingayya v. *Araveti Chinnarayana.* (*Ayling, Seshagiri Aiyar and Bakewell, JJ.*) F. B. 565

———S. 22—" *Person aggrieved by any act or decision of the receiver,*" *meaning of—Application by a third person that property ordered to be sold belongs to him and not the insolvent—Application rejected—Whether such person is a person aggrieved*

A person is " aggrieved by an act or decision of the receiver " within the meaning of S. 22 of the Provincial Insolvency Act if a decision has been pronounced which has wrongfully refused him something which he has a right to demand.

A person who applies to the official receiver claiming that a certain property put up for sale as the property of the insolvent is not the property of the insolvent but of the applicant and as such ought not to be sold as the property of the insolvent, is a person aggrieved by the order if notwithstanding the application the property is ordered to be sold.

Alagappa Chettiar v. *Naganatha Mudaliar.* (*Phillips J.*) ... 612

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 7 —*Landlord and tenant—Demise of two properties—Lessor's right to one of the villages lost by decree—Suit for rent for the remaining property, at a rateable amount—No allegation of apportionment—Whether a suit for apportionment of rent—Purchaser of the lessor's interest in one of the properties in execution—Transfer of Property Act, S. 36, principle of—Applicability.*

Where two properties were demised by the plaintiff to the defendant for a lump sum and subsequently the plaintiff lost his title to one of the properties by a decree and the plaintiff sues for rent claiming a rateable amount of the properties still owned by him without any allegation of the rent having been apportioned the suit is one for an apportionment of rent within the meaning of Art 7, Sch. II of the Provincial Small Cause Courts Act as the suit involves an apportionment of rent and cannot be decided without apportioning the same.

The provision in S 36 of the Transfer of property Act as to apportionment of rent is a rule of justice, equity and good conscience and it therefore applies to sales in execution.

Kunhi Sow v. *Mullali Chathu* (1912) I. L. R. 38 M 86=23 M. L. J. 695. foll. *Mathewson* v. *Shyama Sundar Sinha* (1906) I. L. R. 33 C 786. dist.

Provincial Small Cause Courts Act—*Contd.* Page

Rent can be apportioned between the original lessor and the purchaser of his interest in execution at court sale on the principle of S. 36 of the Transfer of Property Act.

Vema Rangiah Chetty v. *Vajravelu Mudaliar.* (*The Chief Justice, Bakewell and Kumaraswami Sastri, JJ.*) 618

Purdanashin Lady — *Will—Execution—Nature of proof—Question of special incapacity not raised in the first Court when allowed on appeal — Hindu Law — Widow — Acquisitions out of income of properties granted for maintenance—Nature of estate.*

The rule as to *Purdanashins* does not apply to all *Gosha* ladies alike The rule at the best is one of presumption of want of ordinary capacity, which can be rebutted. Where it is found that a *Gosha* lady was, at the time of the execution of a will by her, about 55 years of age, was transacting business through agents to whom she gave personal instructions, interviewing Government Officers, giving evidence before Magistrates, directly presenting documents for registration, conducting heavy litigations through capable lawyers and giving them instructions, it is difficult to treat her as a *purdanashin*, though she as belonging to a noble family may be *Gosha* when young and may not needlessly appear in public even when she was advanced in years.

In a suit by a legatee to recover property bequeathed under the will of a Gosha lady, the only defences set up and the issues raised at the trial related to the genuineness of the will and its alleged revocation by the testatrix. There was no plea that the testatrix was a purdanashin lady who was unable to take care of herself and required special protection when she executed the will. The Court of first instance found the will to be genuine and subsisting and decreed a portion of the claim. The appellate court while holding that the will was genuine in the sense that the testatrix signed it, dismissed the suit on the ground that there was no direct proof that the will was read out and explained to, and was understood by the testatrix, who being the widow of an Uriya Zemindar must have been a purdanashin lady. *Held* that the appellate court should not have allowed such a plea to be raised for the first time in appeal, at any rate without giving an opportunity to the plaintiff to adduce evidence of the testatrix's capacity and status, the circumstances attending the execution of the will and the means she had of obtaining independent advice.

The ordinary presumption that a person in possession of property is the owner and absolute owner thereof applies to Hindu women also.

Where a Hindu widow purchases property out of the savings from the income of certain properties granted to her for life in lieu of maintenance, she has absolute powers of disposition *inter vivos* or by will over the property so purchased.

Sri Vikrama Deo Garu v. *Sri Vikrama Deo Maharajulungaru.* (*Spencer and Srinivasa Aiyangar, JJ.*) 665

Registration Act, III of 1877 Ss. 3, 17 and 49.—*Unregistered agreement to lease—Suit for specific performance, damages—Document inadmissible in evidence—Evidence Act, S. 91, effect of.*

A suit for specific performance with a claim for damages in the alternative, was instituted on foot of an unregistered agreement executed by the defendant, the material portion of which was as follows :—" Received

Registration Act—*Contd.* Page

advance from C. (plaintiff) one hundred rupees for giving a lease of 1 3/4 grounds for 25 years at Rs. 3/3 a month." *Held* that the suit should be dismissed. The document though in form, a receipt for an advance of rent, was in substance an agreement to lease, and being unregistered, was itself inadmissible in evidence and was also a bar to the reception of evidence *aliunde* both as regards the claim for specific performance and the claim for damages. *Narayana Chetti* v. *Muthiah Servai.* (1910) I. L. R. 35 M. 63, followed.

Per Oldfield, J.—The question of admissibility of a document like the one sued upon ought to be dealt with according as it is or is not the record which the parties may be supposed to have prepared for future use in cases it should be necessary to ascertain the terms of the agreement between them. and the circumstances in each case will therefore be, to some extent material.

Sreeramulu Naidu v. *Ramaswami Mudaliar.* (*The Chief Justice and Oldfield, JJ.*) 596

Registration Act, S. 17 Sub-S. 2, (vi)—*Compromise of suit—Decree passed in accordance with compromise—Decree passed on considering the beneficial nature of the whole compromise—Portions of the razinama not relating to the suit property whether requires registration.*

Where a court by its decree accepted the whole of a razinama as beneficial to the minor and in consequence of such acceptance, passed a decree in accordance therewith so far as the suit property is concerned, the other portions of the razinama do not require registration.

Where a decree is passed after a considaration of the whole razinama, the agreement becomes part and parcel of the decree; for it cannot be presumed that the decree would have been passed if the portion of the razinama relating only to the suit property had been considered; and as such no portion of the razinama requires registration.

Natesa Chetti v. *Vengu Nachiar* (1910) I. L. R. 33 M. 102 at 108: followed.

Ariyaputhra Goundan v. *Ettiya Goundan.* (*Bakewell and Phillips, JJ.*) 615

———S. 47—Unregistered agreement to lease-Suit for specific performance or damages—Document inadmissible in evidence. *See*—Registration Act Ss. 3, 17 and 49 596

———Ss. 72 and 77 — *Document presented within time improperly returned by registering officer—Fresh presentation after four months —Refusal to excuse delay—Refusal to accept document for registration —Appeal to District Registrar, if lies—Dismissal of appeal, if gives rise to a cause of action for a suit under S. 77.*

A document was presented for compulsory registration on the last day allowed by law but was not received by the registering officer. Thereupon the document was presented on the next day with an application for excusing the delay. The latter application was rejected and the registering officer refused to accept the document for registration. An appeal to the District Registrar having been dismissed, the aggrieved person instituted a suit under S. 77 of the Registration Act. *Held*, that the order of the registering officer was a refusal to register within the meaning of S. 72 of the Registration Act against which an appeal lay to the District Registrar and that the dismissal of the appeal by the latter gave rise to a cause of action for a suit under S. 77 of the Registration Act.

Registration Act—*Contd.* Page

Gangava v. *Sayava* (1896) I L R 21 B 690 disapproved ; *Narasimha Narayanim Varu* v *Ramalinga Rao*, (1899) 10 M L J 104 *and Srinivasa Pattar*, *Karrikar* v. *Krishna Iyer*, (1914) 26 M L J 307 referred to.

Gangadara Mudali v. *Sambasiva Mudali*. (*Abdur Rahim, Spencer and Srinivasa Aiyangar, JJ.*) 51

Religious Endowments—*Mutts—Alienation by the matadhipati of mutt properties—Suit under O 1 R 8 of the Civil Procedure Code by two persons on behalf of themselves, other thambirans and disciples—Suit to declare alienation invalid and to have the property handed over to the matadhipati—Maintainability of—Limitation—Limitation Act, Arts.* 134, *144.*

A siut by two plaintiffs with leave under O. 1. R. 8 of the Civil Procedure Code as representing themselves and other Thambirans and disciples of the mutt to declare certain alienations by the mahant invalid and to have the property handed over to the defendant mahant is maintainable; and the period of limitation will be as under Art. 144 or 134 of the Limitation Act; and the possession of the alienee must be regarded as adverse to the institution and to the plaintiffs who claim on to behalf.

The present suit brought on behalf of all the beneficiaries stands in some respects on the same footing as an information filed by the Attorney-General in England on the information of relators to recover charitable property improperly alienated by the trustees. On such information the Court of Chancery recovered the property so alienated by cancelling the conveyance and directing possession to the trustees who did not occupy the position of the plaintiffs.

Magdalen College v. *Attorney—General*, (1857) 6 H. L. C. 189=10 E R. : 1267 *Attorney General* v. *Flint* (1814) 4 Hare 147=67 E. R 597 followed.

Even if the mahant is not in the position of a trustee, the plaintiffs have as in *Arunachellam Chettiar* v. *Velappa Thambiran* (1915) 28 M. L. J. 410 sufficient interest in the institution to entitle them to sue under O. 1 R 8 of Civil Procedure Code in respect of a wrongful alienation of mutt property.

The nature of actions relating to charity properties and the powers of Courts therein discussed.

Chidambaranathan Thambiran v. *Nallasiva Mudaliar*. (*Chief Justice and Seshagiri Aiyar JJ*). 357

———*Powers of shebait—Permanent lease of debutter property by shebait—Necessity or benefit, test of—Rules according to which the property and income of the endowment are to be dealt with—Sale of debutter property with a view to investing the sale proceeds—Propriety of—Existence of an ancient custom—A question of mixed law and fact.*

Whether a shebait of a Hindu temple leased out on permanent cowle, a house site belonging to the temple on which there were some ruins and which was not fetching any income, on a premium of Rs. 93 12-0 to the rustees of another charity and the succeeding shebait sued for a declaration that the permanent lease was invalid and for recovery of possession of the site after demolishing the buildings which the lessees had erected on the site.

Held, the grant of a lease in perpetuity of debutter lands at a fixed rent requires to be justified by unvoidable necessity ; and an absolute

Religious Endowments—*Contd.*
alienation of the property in perpetuity in consideration of a premium also requires to be justified by the same kind of necessity

The power of the manager of an infant heir to whose position that of a shebait is analogous, to charge an estate not his own is under the Hindu Law a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. It is impossible to give a precise definition of the expression "benefit to the estate" so as to be applicable to all cases. The preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by these and such like things would be obviously benefits.

A shebait would not be justified in selling debutter land solely for the purpose of getting capital to embark on a money lending business, however attractive and lucrative money lending may be.

Where there is no deed of endowment, the rules according to which the property and its income are to be dealt with in order to carry out the intention of the original endower can only be assertained by inference from the practice proved by evidence, to have been followed in the particular case But these rules, so to be inferred must not be inconsistent with or repugnant to the very nature and purpose of the endowment. If, for instance, the worship of the idol in the temple be intended to be perpetual, the preservation and use of the dedicated property to support and maintain that worship, must be assumed to have been intended to be perpetual. A rule, therefore which would authorise and empower the shebait of such a temple, arbitrarily and at his own mere will and pleasure to alienate the dedicated property either bit by bit or *en bloc* would be so repugnant to the whole purpose and object of the endowment that it could not rationally be held to embody the intention of the original endower.

The existence of an ancient custom is a question of mixed law and fact. To find an ancient custom, the Judge has first to find what were the things actually done in alleged pursuance of custom and then has to determine whether these facts so found satisfy the requirements of the law. This latter is a question of law and not of fact.

Palaniappa Chetty v. *Deivasikamony Pandara Sannadhi.* (*Lord Atkinson.*) P. C. 1

———*Trustee—Suspension of—Power of Committee by circulation—Ordinary mode of a corporation transacting business—Suit for a declaration that suspension was wrongful—The existence of sufficient grounds for suspension not a valid defence—Trustee wrongfully suspended by Committee—Right to damages against the members of the committee.*

The ordinary way of bodies in the position of a corporation to transact business is at a meeting and assuming that it is open to them to transact some of their business in circulation they have no such power as regards matters such as suspension or dismissal of free-hold officers under their superintendence as to which their authority must be strictly pursued. *Rex* v. *Taylor*, 1. (1691) 3 Salk 231. *Rex* v. *Sutton* (1711) 10. Mod. 74. *Thandavaraya Pillai* v. *Subbayyar*, (1899) I. L. R. 28 M. 488. *Ponnambala Pillai* v. *Muthu Chettiar*, (1916) 30 M. L. J. 619, followed.

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Even if the question of suspension or dismissal could properly have been dealt with in circulation that could only have been by consent of all the members and any one of them would have had the right to insist on the question being dealt with at a meeting.

When a temple trustee had been given notice of some or all of the charges against him and one member of the temple commitee drew up a report and forwaded copies of it to the other members of the temple committee proposing that the temple trustee should be suspended until further orders and the other members excepting one assented to the course, the action of the committee in suspending the trustee is *ultra vires* especially as one member objected to the legality of the step.

In a suit by the plaintiff trustee who was so suspended for a declaration that his suspension from the office was illegal and for damages it is not open to the court to enquire whether there were valid grounds for suspending the plaintiff and if so to dismiss the suit. It would not be a good answer to the suit to show that there were sufficient grounds for suspending the plaintiffs.

A person in enjoyment of a public office like that of a temple trustee is entitled to damages against corporators who were parties to his wrongful removal from office *Vijayaraghava Chariar* v. *Secretary of State for India* (1884) I. L. R. 7 M. 466. followed,

Venkata Narayana Pillai v. *Ponnusami Nadan*, (*The Chief Justice and Kumaraswami Sastri, J.*) 660

Religious Endowments Act (XX of 1863) Ss. 7,8,9, 10 and 14—*Appointment of Member of Committee managing religious Endowent—Whether such appointment by a Civil Court is an administrative or a judicial act—"Case," meaning of—Revisional Powers of High Court—Code of Civil Procedure*, 1908 (*Act V of* 1908) S. 115.

S. 10 of the Bengal and Madras Native Religious Endowments Act, 1863, does not empower the Civil Court to direct the remaining members of a ommittee appointed under that Act, when they have failed to hold an election for the choice of a new member, to hold such an election. It can direct them to fill up the vacancy, but such filling up is then their own act.

A proceeding of the Civil Court under this section is a judicial and not merely an administrative or ministerial act. In such matters the Civil Court exercises its powers as a Court of law, not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal tribunal.

S. 115 of the Code of Civil Procedure enables the High Court, in a case in which no appeal lies, to call for the record and to pass such order in the case as the Court may think fit. The section applies to jurisdiction alone, the irregular exercise, or non-exercise of it or the illegal assumption of it; it is not directed against conclusions of law or fact in which jurisdiction is not involved.

"Case" is not defined in the Code. It cannot be confined to litigation in which there is a plaintiff who seeks to obtain a particular relief against a defendant before the Court includes an *ex parte* application praying that persons in the position of trustees or officials should perform their trust or discharge their judicial duties. It includes therefore proceedings under S. 10.

Religious Endowments Act—*Contd.* Page
14 *Balakrishna Udayar v. Vasudeva Aiyar, (Lord Atkinson) J. C.* ... 69

———*Ss 14 and 18—Suit instituted by four persons with leave of Court—Death of one* pendente lite—*Suit, if abates.*

A suit instituted under S 14 of the Religious Endowments Act by four persons with leave of the Court under S. 18 of the Act, does not abate by reason of the death of one of the plaintiffs during the pendency of such suit.

Venkatesha Malla v. *Ramayya Hegade* (1914) I. L. R. 38 M. 1192=27 M. L. J. 241. distinguished. ... ...

Parameswaran Munpee v. *Narayanan Nambudri* (1916) I. L. R. 40 M. 110=31 M. L. J. 297. referred to. ... ...

Alagappa Chettiar v. *Muthiah Chettiar, (Ayling and Sadasiva Aiyar JJ.)* 173

Res Judicata—Co-defendants—Finding in previous suit *res Judicata,* only if finding necessary—*See* Civil Procedure Code S. 11 ... 740

———Finding unnecessary—But embodied in decree—Res judicata—*See.* C. P. Code S. 11 740

———Mesne profits—future—Decree silent as to—Fresh suit for mesne profits not barred—*See* Res judicata 699

Sale of goods—*Contract c. i. f.—Goods shipped in a German ship—Outbreak of war, while steamer was on voyage—Effect of war on contract—Whether buyer bound to accept goods.*

Where the plaintiffs agreed to buy a certain number of cases of Belgium window glass under a c. i. f. contract and the goods were shipped at Antwerp between the 26th and the 29 of July 1914 and the war broke-out while she was on her voyage, on the 3rd August 1914 between England and Germany, but she was, after being condemned as a prize, allowed to proceed to such ports in the British Empire as she had cargo for and to discharge the cargo there, and the defendant was thus in a position to hand over the cases of glass to the plaintiff and take the price for them, in a suit for damages for the breach of the contract by the defendant, *held,* the buyer could not in such circumstances enforce the contract and judgment must be entered for the defendant. Under a c. i. f. contract for the sale of goods there is a sale of goods by the delivery to the ultimate owner of the documents of title to the goods. Where the seller tenders to the buyer documents under a c. i. f contract which includes a bill of lading in an enemy ship, the tender is bad, because the contract was rendered illegal as it involved a contract of affreightment with an alien enemy and similarly the buyer cannot enforce the contract against the seller.

Arnhold Karberg & Co. v. *Blythe Green, Jourdain & Co.* (1915) 2 K. B. 379, *Arnhold Karberg & Co.* v. *Blythe Green Jourdain & Co.* (1616) 1 K. B. 495. followed.

Madhoram Hardeo Dass v. *G. C. Sett and B. R. Sett.* (1917) 21 C. W. N. 760, *Marshall and Co.* v. *Naginchand Fulchand* (1916) 18 Bom. L. R. 915. approved.

P. Thiruvarangiah v. *D. K. Pania & Co., (Coutts Trotter J.)* ... 419

Small Cause Court Act,—*Foreign decree — Execution — Jurisdiction—Judge of Small Cause Court, Madras, and Registrar of that Court—Powers of—Execution application—Dismissed for default of*

Small Cause Court Act, Madras—*Contd.* Page

prosecution—Fresh application within a year of prior one—Order for arrest of judgment-debtor—Legality—Failure to give notice to him—Failure to record reasons for arrest without notice—Effect—C. P. C., S. 115—Revision—Interference in—Grounds—Order to be revised manifestly illegal—Petition without merits—Effect.

The Registrar of the Presidency Court of Small Causes, Madras, has no power to execute the decree of a foreign Court. Such a decree may however be put in motion by a Judge of that Court.

Where an application made in November 1915 to the Registrar of the Small Causes Court, Madras, for execution of a decree of the Court of the District Munsiff of Mysore was dismissed for default of prosecution and on an application presented for the same purpose in December of the same year, the Registrar ordered the arrest of the judgment-debtor without previously giving notice to him and without recording reasons for holding that it was absolutely necessary in the interests of justice that his arrest should be ordered at once.

Held, in revision under S. 115 of the Code, (1) that the Registrar had no jurisdiction to execute the decree, (2) that, in any event the Registrar acted illegally in ordering the arrest of the judgment-debtor without notice to him, and (3) that the High Court would not condone the manifest illegality and decline to interfere in revision on the ground that the petitioner the Judgment-debtor, had no merits.

Srinivasa Aiyangar v. *Narayana Aiyangar* (*Seshagiri Aiyar, J.*) 539

Specific relief Act (I of 1877), S. 21—Agreement to refer disputes to arbitrators—Subsequent suit on the same subject matter— Award pending the suit—Court not competent to pass a decree on award. *See* C. P. Code Sch. II paras 18 & 22 177

———**S. 21** — *Enactment of Civil Procedure Code* (*V. of* 1908), *Sch. II. para.* 22, *during pendency of reference to arbitration—Rights of parties unaffected—Bar of suit—Termination of arbitration proceedings by death of arbitrators—Suit for dissolution of partnership and accounts—Limitation — Time, if runs, during pendency of arbitration—Limitation Act* (*IX of* 1908), *article* 120, *applicability of.*

Certain disputes between the plaintiffs and defendants as regards the taking of accounts of a partnership said to have been dissolved in 1905, were referred to arbitration on 8-3-1906. The arbitration proceedings came to an end on 31-10-1910 by the death of the arbitrator. In a suit instituted by the plaintiffs in 1911 for dissolution and accounts, the defendants raised the plea that it was barred by limitation, *held*, that the suit was not barred.

The effect of S. 21 of the Specific Relief Act, while it was in force, was to confer on the other parties to the contract, a right to have their disputes decided by arbitration and not by suit and this was a substantive right which when once it accrued, would not be affected by the enactment of S. 22 of Schedule II of the Civil Procedure Code, 1908.

Further, the special provision in S. 21 of the Specific Relief Act, while it was in force, prevented time running against the plaintiffs under the Limitation Act and whether the effect of this provision was merely to suspend the running of time or to take the case out of the specific

Page

Specific Relief Act—*Contd.*

article and bring it under article 120, in either case, the suit was within time.

The institution of a suit after a contract to refer to arbitration is a sufficient refusal to perform such contract so as to bar the suit under the section.

Ramkumar Singh v. *Jagmohan Singh* (1910) I. L R. 33 A. 315. referred to.

Per Seshagiri Aiyar, J.; The residuary article 120 applied to the case and the cause of action for the suit having arisen on the death of the arbitrator in 1910, the suit was within time.

Doraisami Padayachi v. Vaidyalinga Padayachi. (*Chief Jutice and Seshagiri Aiyar, J.*) 46

——S. 42—*Proviso—Scope of—Suit for declaration, that a mortgage decree is not binding on plaintiff and for an injunction restraining execution—Prayer for redemption, not essential.*

A minor plaintiff brought a suit for a declaration that a mortgage decree passed against her as representative of her husband was not binding on her on the ground that she was sued and the decree obtained against her, as a major, and for an injunction restraining the defendant from executing the decree against her interest in the mortgaged property. The trial Judge dismissed the suit, holding that the plaintiff was not entitled to the declaration prayed for, as she had omitted to sue also for redemption of the mortgage, that being a consequential relief which she was bound to ask for, under the proviso to S. 42 of the Specific relief Act.

Held, reversing the judgment of the trial judge that the suit as framed was maintainable and that the plaintiff was not bound to ask for redemption.

Per *Oldfield, J.*—The "further relief" contemplated by the proviso to S. 42 of the Specific Relief Act means further relief arising from the cause of action on which the plaintiff's suit for declaration is based.

Kanniammal v. *Sanka Krishnamurthi.* (*The Chief Justice and Oldfield, JJ.*) 676

——S. 53—Temporary injunction in mandatory form—Jurisdiction of Court to issue.—*See* C. P. Code, O. 39 R. 2 448

Stamp Act, S. 2 (16) (b)—*Counterpart of—Mortgage—Marupat—How must be stamped.*

A marupat is a counter-part of a lease or a deed executed by a tenant promising certain rent and must be stamped both as a counter-part and as a mortgage.

Govinda Nambudri v. Ottathayil Moideen. (*The Chief Justice, Ayling and Kumaraswami Sastri, JJ.*) *F. B.* 693

——S. 30 (a)—*Document—Construction—Bond or Promissory note—Admissibility in evidence in payment of penalty and stamp duty.*

A document attested by two witnesses and stamped with an adhesive stamp of one anna, ran as follows:—

"Promissory note executed on 30-9-1903 to R. by M. C. I promise to pay you or your heirs, on demand the sum of Rs. 40, the amount I borrowed from you this day, with interest at 1 per cent per mensem on the said amount..................(Sd.) M. C."

Held, that the document was a bond and not a promissory note, and that it could be admitted in evidence on payment of penalty and stamp duty under S. 35 (*a*) of the Stamp Act.

Stamp Act—*Contd.* Page

Kasaram Rangiah v. *Malla Chengama Naidu.* (*Subramania Aiyar and Moore, JJ.*) 603

Stay of execution—*Order becomes effective only when communicated to the Lower Court.*

An order by the Appellate Court for stay of execution takes effect only when it is communicated to the Lower Court; and an attachment ordered by the Lower Court after the passing of the order for stay of execution but before it was communicated, is valid. *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar*, (1909) I. L. R. 33 M. 74 approved.

Venkatachelapati Rao v. *Kameswaramma.* (*Ayling, Seshagiri Aiyar and Bakewell JJ.*) *F. B.* 515

Subrogation—Creditor—Execution of promissory note by executor for debts borrowed *bona-fide* in due course of administration—Right of creditor to proceed against the estate *See* Promissory Note ... 631

Transfer of Property Act, S. 36—Principle of, one of justice, equity and good conscience--Rule applicable where portion of lessor's interest has passed in execution. *See* Provincial Small C. C. Act, Sch. II Art. 7... 618

——— S. 51—Invalid transfer—Improvements by transferee—Right to compensation on ejectment—*See* Estoppel 252

——— S. 51—Suit under O. 21 R. 63 of the C. P. Code—Right of claimant to improvements in case attachment upheld—Right to be declared in decree—*See* Transfer of Property Act, S. 98 ... 316

——— S. 51—Transferee from tenant claiming occupancy rights—No right to compensation on ejectment by landlord—*See* Landlord and Tenant 84

——— S. 53—Benami Fraudulent transfer—Fraud not effected—Right of owner to recover—Allegans turpitudinem inan non est audiendus—Scope of the Maxim. 696

——— S 53—Fraudulent transfer—Suit for declaration by unsuccessful claimant—Plea of fraudulent transfer, not open—Remedy of creditor to institute a suit—*See* Civil Procedure Code O. 21 R 63 ... 705

——— S. 54 and 118—Unregistered instrument of exchange—Erection of costly buildings—Actings of the parties—Part performance—Acquiescence—Estoppel—Title does not pass by—*See* Estoppel ... 252

——— S. 58 (d)—*Usufructuary mortgagee Meaning—Usufructuary mortgage—Failure of mortgagor to give possession of mortgaged property—Mortgagee's right to sue for sale of mortgaged property.*

A usufructary mortgagee is entitled to sue for the sale of theproperty mortgaged to him when the mortgagor fails to deliver possession of the said property to him and he has consequently to sue for the mortgage money.

Per The Chief Justice: A mortgagee to whom possession has not been given is not a usufructuary mortgagee within the meaning of S. 58 (d) of the Transfer of Property Act.

Samayya v. *Nagalingam* (1891) I. L. R. 15 M. 174 *Arunachalan Chetty* v. *Ayyavayyan* (1898) I. L. R. 21 M 476. overruled.

Ram Narain Singh v. *Adhinrda Nath Mukherjee* (1916) I. L. R. 44 C. 388=32 M. L. J. 39. (P. C.) rel upon

Marturu Subbamma v. *Gadde Narayya.* (*The Chief Justice, Ayling and Kumaraswami Sastri, JJ.*) *F. B.* 628

Transfer of Property Act—*Contd.* Page

———**S. 60**—*Mortgagee releasing portion of the mortgaged property, not bound to abate proportionate part of the debt.*

A mortgagee voluntarily releasing from the suit a portion of the mortgaged property is not bound to abate a proportionate part of the mortgage-debt.

Krishna Ayyar v. *Muthukmaraswamiya Pillai* (1905) I. L. R. 29 M. 217, 224. *Juagl Kishore Sahu* v. *Kedar Nath* (1912) I. L. R. 34 A. 606. referred to.

Ponnusami Mudaliar v. *Srinvasa Naicken* (1908) I. L. R. 31 M. 333. *Surjiram Marwari* v. *Barham Deo Persad* (1905) 1 C. L. J. 337. dissented from.

Perumal Pillai v. *Raman Chettiar*. (*Chief Justic, Oldfield and Kumaraswami Sastri, JJ.*) *F. B.* 211

———**S. 61**—*Redemption—Barred debt—Mortgagor not bound to pay, on redeeming subsisting mortgage—Merger—Simple money debt—Conversion of, into mortgage-debt or judgment-debt—Deed—Construction—Charge, creation of—Mortgage and lease, when viewed as parts of the same transaction.*

Under a usufructuary mortgage of 1867 the mortgagor agreed to pay the mortgagee at the time of redemption "the consideration amount of the mortgage together with arrears of rent, if any, in respect of the said property if the same is taken on lease by me (the mortgagor) from you (the mortgagee)." The property was taken back by the mortgagor on lease and held by him till 1882 when the mortgagee evicted him and got possession under a decree of Court. For the time the mortgagor was in possession he owed the mortgagee certain arrears of rent. The accounts of these arrears were settled in 1873 and again in 1877 and the mortgagee obtained from the mortgagor two simple mortgage deeds for the amounts due till then. The mortgagee had claimed the subsequent rent due in his suit for eviction and had obtained a money decree for it. In 1914 the mortgagor sued for redemption and the mortgagee insisted on payment of the amounts due under the two simple mortgage bonds and also under the decree in his favour. It was found that on the date of the suit for redemption, the mortgagee's right to execute the decree and to enforce the two mortgage bonds had become barred by limitation.

Held that, assuming that all the mortgages over the same property and in favour of one and the same person ought to be simultaneously redeemed, the rule should be confined to cases where the mortgages insisted on being redeemed are enforceable and are not such as barred by limitation or any other cause from being enforced by suit.

Athan Kutti v. *Subhadra* (1916) 32 M. L. J. 317, *Kesar Kunwar* v. *Kashi Ram* (1915) I. L. R. 37 A. 684. Relied upon.

Per Spencer, J.:—The mortgagee having got simple mortgages executed in respect of the arrears of rent on the property usufructuarily mortgaged could not fall back on the security of the earlier usufructuary bond which contained a stipulation for payment of arrears of rent on redemption, as the later mortgages constituted a novation of the original contract.

Per Krishnan, J.:—There was nothing more than a mere personal covenant to pay arrears of rent in the original usufructuary mortgage bond and it was not possible to look upon the lease to the mortgagor as

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part of the mortgage transaction or upon the rent payable under the lease as the interest payable on the mortgage money and therefore charged on the property equally with the principal sum.

Altaf Ali Khan v. *Lalta Prasad* (1897) I. L. R 19 A. 496, *Madhwa Siddhanta Onahini Nidhi* v. *Venkataramanjulu Naidu* (1903) I. L. R. 26 M. 62, *Chimmanlal* v. *Bahadur Singh* (1901) I. L. R. 23 A. 338, Referred to.

The mortgagee's claim for arrears of rent being a simple money debt, became merged in the judgment-debt and the secured mortgage debts obtained by the mortgagee and could no longer be enforced as such.

Velayuda Reddi v. *Narasimha Reddi* (1916) 32 M. L J. 263, *Mahant Prayag Doss Jee Varu* v. *Chengama Naidu* (1916) 4 L. W. 477, Distinguished.

Ramakrishna Kukkilaya v. *Nakker Kuppanna.* (*Spencer and Krishnan, JJ.*) 581

———S. 67 A.—Usufructuary mortgage—Failure of mortgagor to give possession of mortgaged property—Mortgagee's right to sue for sale of mortgaged property—*See* Transfer of Property Act, S 58 (d) ... 623

———S. 90—Mortgage decree for sale before the new C. P. Code—Combined decree—Direction for realising balance personally—Application for passing personal decree superfluous—*See* Mortgage ... 543

———S 98—*Combination of simple and usufructuary mortgages—Condition that the motrgagee should hold the property as owner on non-payment within a certain time—Clog on the equity of redemption—Possession originally under mortgage—Subsequent change of character of, by subsequent arrangement—Possession adverse—Claim-Petitioner acquiring property subsequent to attachment—Whether can be set up in suit to set aside order in the claim proceedings—Transfer of Property Act, S. 51—Improvements effected by claim petitioner—Provision should be made for in the decree.*

Where a mortgage which is a combination of a simple and usufructuary mortgage contains a condition which converts it into a sale in case the amount due is not paid within a certain period, such a condition is a clog on the Equity of redemption and ought to be relieved against.

Srinivasa Aiyangar v. *Radhakrishna Pillai* (1913) I. L. R. 38 M. 667. =26 M. L. J., 47 Followed.

Where by reason of a subsequent arrangement possession which originally commenced under a mortgage is continued in a different capacity, it would suffice to start adverse possession.

Where certain property is attached by the decree-holder as the property of the judgment-debtor and a third person whose title had not ripened into ownership by adverse possession on the date of the attachment preferred a claim which was allowed and the decree-holder institutes a suit under O. 21, R. 63, the claim petitioner is not entitled to resist the suit on the ground that his title has become perfected by his possession subsequent to the date of attachment.

The right restored to the parties is the right which they asked the Court to give a decision upon as on the date of the attachment.

Where such a suit, it is decreed that the plaintiff is entitled to sell the property subject to the usufructuary mortgage in favour of the claim petitioner defendant, and the latter had effected some improvements

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honestly believing that he was absolutey entitled to the property, the dercee should make it clear that the sale is subject to the value of improvements the value of which will have to be paid to the defendant before evicting him.

Pandiyan Pillai v. Vellayappa Rowther. (*Seshagiri Aiyar and Kumarasami Sastri, JJ.*) 316

——— S. 100—*Charge—Validity of—Charge to secure a liability which may arise in the future.*

An instrument by which a liability not existent *in praesenti*, but which will arise, if at all in the future is secured, may create a present charge within the meaning of S. 100 of the Transfer of Property Act.

Where in a partition deed between the members of a joint family it is provided, that if owing to the default of two of the dividing co-parceners the debts which they had undertaken to pay should have to be paid by the others, then the persons who paid should recoup themselves out of the properties allotted to the defaulting parties creates a present charge within the meaning of S 100 of the Transfer of Property Act.

Imbichi v. *Achampat Avukoya Haji.* (*Coutts Trotter and Srinivasa Aiyangar, JJ.*) 59

Ss. 106 and 109—Notice to quit—Right of lessee for a term to give notice to monthly tenant 684

——— S. 118—Exchange of land—Unregistered instrument—Erection of costly buildings—Actings of the parties—Part performance—Title by estoppel—*See* Estoppel 225

Trust—*Lease by managing trustee of a temple. When binding on the institution—Unregistered lease for a term of years—Lessee in possession paying monthly rent—Presumption of monthly tenancy—Right of new lessee from lessor to give notice to quit to monthly tenant on the land—Transfer of Property Act, Ss. 106 and 109—English and Indian Law.*

Where in accordance with the usual practice of a temple, the managing trustee leases out temple properties taking the muchilika in the name of both the trustees and the other trustee does not object to the arrangement, the lease is binding on the temple.

Where a tenant who originally came into possession of the demised land under an unregistered and therefore invalid lease for 10 years, continued in possession with the consent of the lessor paying rent at a monthly rate, the presumption is that a monthly tenancy was created between the parties by oral agreement accompanied by possession.

Where there was an outstanding monthly tenancy at the time of the grant of a term lease for 20 years in favour of the plaintiff, it is competent to the plaintiff to give a valid notice to quit to the monthly tenant of the premises and to eject the latter on the expiry of the period prescribed by such notice. The provisions of the Transfer of Property Act are not inconsistent with the English Law on this subject.

Manickam Pillai v. *Ratnasami Nadar.* (*Spencer and Krishnan, JJ.*) 684

Trusts Act S. 75— Principle of, applicable to public trusts—Promissory note in favour of a person as trustee of a charity—Right of successor to sue on promissory note without endorsement—*See* Promissory Note. 627

——— S. 90—Renewal of lease by head-lessor—Right of sub-tenant to benefit of renewed lease, when arises—*See* Landlord and Tenant ... 370

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Will— *Administration — Debtor of the testator appointed as executor —Suit by legatee against the representatives of the executor —Nature of the action—Period of limitation for suit—Amendment of plaint—Right to claim interest against representatives of executor.*

A died in 1903 having made a will by which he appointed three persons B, C and D as executors of whom B was indebted to him on dealings at the date of his death, and by the same will he gave his widow E authority to adopt a son and bequeathed ½ of his residuary estate to the son to be adopted and ½ to his widow, the bequests to be paid on the adopted son attaining majority. D having declined to act as executor, only B and C acted as executors. The widow E adopted F in pursuance of the authority given in the will.

In a suit in 1911 by F, still a minor, to recover from the legal representatives of B—B having died in the meanwhile in 1906—as on a debt.

Held, that plantiff being only a lagatee, he does not represent the estate and has no direct claim against any debtor to the estate. His only right is to recover as legatee his share of the residue which was bequeathed to him from the executors and if the executors had died possessed of property belonging to the testator to recover the same from their representatives.

If the executors fail to do their duty and refuse or neglect to sue, a legatee may sue the executors in due course of administration and may join the debtor or his representatives as parties and claim payment of the debt due to the estate.

If the debtor himself is one of the executors, the debt payable by him is assumed to have been paid by him to himself and becomes part of the assets of the deceased testator in his hands.

This will be the case whether the executor proved the will or not, provided he acted as executor.

Wankford v. *Wankford*, (1703) 1 Salk 329 ; *In re Applebee* ; *Leveson Beales* (1891) L. R. 3 Ch. 422. followed.

If a person appointed as an executor renounces the office or died without having acted, or obtaining probate, he will be in the position of a stranger debtor and an action to recover the debt will be barred unless brought within the time limited for an action to recover a debt *Ingle* v. *Richards* (1860) 28 Beav. 863, followed.

One executor is as much entitled to be in possession of the assets of the testator and expend it in due course of administration as his co-executor, and there can ordinarily be no suit against him by the co-executor to pay over the assets to him.

Beall v. *Hilliary* 54 Am. Dec. 649, followed.

The suit in the present case is not barred as it falls under Art. 123 and especially as the plaintiff is a minor even at the date of the suit. The widow herself will not be barred as the legacy is only payable on the plaintiff attaining majority.

The principles regarding amendments of plaint considered.

The proper order in such a suit will be to direct the defendants to pay into Court out of the joint family property in their hands the sum for

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which on taking accounts they are found liable and directing its investment when paid under the direction of the Court, liberty being reserved to apply for their shares on plaintiff attaining majority.

As the moneys in the hands of executors have been invested and lent out at interest, their Lordships allowed interest at 6 per cent. from the date of the death of the testator till the date of payment, in the absence of proof that the amounts could have been lent out at any particular rate.

Chunduru Chinna Lakshmi Narayana v. *Neralla Venkata Subba Row*, (*Ayling and Seshagiri Aiyar, JJ.*) 195

———Execution—Purdanashin lady—Question of Special incapacity to be pleaded—*See* Purdanashin lady. 665

Workmen's Breach of Contract Act (XIII of 1859) *'Workman', meaning of—Scope of the Act.*

It is necessary that a person should be an artificer, workman or labourer before the provisions of the Workmen's Breach of Contract Act can be enforced against him.

Per Sadasiva Aiyar, J. :—The term 'workman' in the Act is used in its popular sense and means "operative, man hired to do manual labour".

Per Ayling, J. :—The word 'workman' in the Act must be understood as connoting manual labour of some kind whether skilled or unskilled.

Per Phillips, J. :—The word "workman" has a very wide meaning denoting (1) a man who is employed in manual labour whether skilled or unskilled, (2) one who works in any department of physical or mental labour.

Kunhi Moidin v. *Chamu Nair.* (*Ayling, J.*) 670

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